

Clerk's Filed Copy

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

ATARI, INC., et al.,

Plaintiffs,

vs.

No. 81 C 6434

NORTH AMERICAN PHILIPS CONSUMER  
ELECTRONIC CORP., et al.,

Defendants.

JUN 10 1982

BEFORE: The Honorable GEORGE N. LEIGHTON,  
Judge.

Tuesday, March 16, 1982

9:00 a.m.

PRESENT:

MR. DANIEL VITTUM  
MR. DAVID SPRINGER  
MR. MARTIN L. LAGOD

for the plaintiff Atari, Inc.;

MR. ERIC COHEN  
MR. DONALD WELSH

for the plaintiff Midway Mfg. Co.;

MR. THEODORE W. ANDERSON  
MR. JAMES T. WILLIAMS  
MR. GREGORY B. BEGGS

for the defendants.

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THE CLERK: 81 C 6434, Atari v. North American.

THE COURT: You may proceed to call your first witness. Go right to a hearing of the evidence.

MR. ANDERSON: Good morning, your Honor, Thank you.

Your Honor, we will proceed, and I presume we will go first?

THE COURT: Pardon me, does he testify here today?

MR. ANDERSON: I presume we will go first.

THE COURT: Oh, yes.

MR. ANDERSON: Thank you. Mr. Beggs will call the first witness. your position there?

Thank you.

THE CLERK: This way, Mr. Witness.

MR. BEGGS: Your Honor, we will call Mr. Frederico, please.

THE CLERK: Come forward and be sworn, Mr. Witness.

Mr. VINCENT FREDERICO, company, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows: Yes, they are owned by the same company.

THE CLERK: Be seated, please, and state your full name. Spell your last name, lean forward and speak directly into that microphone and keep your

1 voice up.

2 DIRECT EXAMINATION

3 BY MR. BEGGS:

4 Q Will you please state your name and address  
5 for the record, please.

6 A Vincent Frederico, 5001 North Mozart, Chicago,  
7 Illinois.

8 Q Did you receive a subpoena to testify here today?

9 A Yes.

10 Q What is your employment?

11 A I work for Minnesota Fats.

12 Q What is your position there?

13 A Merchandise manager.

14 Q How long has that been?

15 A Eighteen months.

16 Q Who do you report to?

17 A Michael Friedman.

18 Q What is his position?

19 A He is the owner of the company.

20 Q Is there any connection between Minnesota Fats  
21 and Showtime Video that you are aware of?

22 A Yes, they are owned by the same company.

23 Q What is your connection, if anything, with the  
24 advertising of Minnesota Fats and Showtime Video?

25 A Well, I give my input to the ads from a

merchandise standpoint to Mike Friedman. Your Honor.

Q For both of those companies? later?

A Yes. COURT: Sure. Just mark the exhibits.

Qust. Minnesota Fats and Showtime? you want the --

A Yes. the designation stickers.

MR. BEGG: We have some stickers on them, Your Honor.

THE COURT: All right. Just mark them. What number is this one?

MR. BEGG: This will be 27, Your Honor.

THE COURT: All right.

MR. BEGG: Defendants' Exhibit 27.

THE COURT: All right.

BY MR. BEGG:

Q Mr. Frederico, I show you an advertisement, document that purports to be an advertisement, and I have marked it Defendants' Exhibit 27.

Is that a Minnesota Fats ad?

A Yes.

MR. BEGG: And your Honor, I earlier intended to mark the copy for reference purposes, and I have a copy here for removal of the paper out of the newspaper.

THE COURT: All right.



1 BY MR. BEGGS: MR. BEGGS: I will ask the -- your Honor,  
2 may we get together with the reporter later?

3 THE COURT: Sure. Just mark the exhibits.  
4 Just, physically, mark them unless you want the --  
5 do you have the designation stickers?

6 MR. BEGGS: We have some stickers on them,  
7 your Honor.

8 THE COURT: All right. Just mark them. What  
9 number is this one?

10 MR. BEGGS: This will be 27, your Honor.

11 THE COURT: All right.

12 MR. BEGGS: Defendants' Exhibit 27.

13 THE COURT: All right.

14 BY MR. BEGGS:

15 Q Mr. Frederico, I show you an advertisement,  
16 document that purports to be an advertisement, and I have  
17 marked it Defendants' Exhibit 27.

18 Is that a Minnesota Fats ad?

19 A Yes.

20 MR. BEGGS: And your Honor, I earlier intended  
21 to mark the copy for reference purposes, and I have  
22 a copy here for counsel of the paper out of the  
23 newspaper.

24 THE COURT: All right.  
25

BY MR. BEGGS: that ad placed in the newspaper by

Q Is that a Minnesota Fats ad that appeared in the Chicago Tribune?

A Yes. North American Phillips Consumer Electronics

Q What was the date of the Tribune appearance?

A March 4, 1982.

A No.

Q Or Park Television?

A No.

Q Do you have any knowledge of the circumstances of this ad getting in the newspaper?

A Yes.

Q What were the circumstances of Minnesota Fats placing this ad in the newspaper?

A Well, I was placed in charge of the advertising in Mike Friedman's absence and because he was out of the country and I instructed Sam Wagner, our advertising manager, to go back in the files and look at ads that we had previously run and to lift some ideas out of those ads and place them into this ad, since it was her first week on the job and she was unfamiliar with our type or style of advertising.

Q Did Minnesota Fats expect to be paid in any respect for this advertisement by Philip Friedman?

A Yes.

1 Q Was that ad placed in the newspaper by  
2 Minnesota Fats?

3 A Yes.

4 Q Did North American Phillips Consumer Electronics  
5 Corporation have anything to do with the placing of this  
6 ad in the newspaper?

7 A No.

8 Q Or Park Television?

9 A No.

10 Q Do you have any knowledge of the circumstances  
11 of this ad getting in the newspaper?

12 A Yes.

13 Q What were the circumstances of Minnesota Fats  
14 placing this ad in the newspaper?

15 A Well, I was placed in charge of the advertising  
16 in Mike Friedman's absence and because he was out of the  
17 country and I instructed Dawn Wagner, our advertising  
18 manager, to go back in the files and look at ads that we  
19 had previously run and to lift some ideas out of those  
20 ads and place them into this ad, since it was her first  
21 week on the job and she was unfamiliar with our type or  
22 style of advertising.

23 Q Did Minnesota Fats expect to be paid in any  
24 respect for this advertisement by Atari?

25 A Yes.

1 Q What were those circumstances?

2 A Well, there is advertising money that is accrued  
3 for dealers to spend to advertise their products.

4 Q What was the connection between that advertising  
5 money and this ad?

6 A We used that money to pay for this ad.

7 Q Is the portion of the ad which refers to the  
8 Magnavox Odyssey material and particularly the phrase  
9 "Odyssey lets you play Pac-Man now with K. C. Munchkin,"  
10 is that something Minnesota Fats put in the ad?

11 A Yes.

12 Q To your knowledge, what references is Minnesota  
13 Fats permitted to make in advertisements for K. C. Munchkin  
14 to the term "Pac-Man"? , and what we propose to show is

15 A In a clarification sense to let the consumer  
16 know what type of game it is, we clarify games as space  
17 games, educational-type games, maze games. Therefore, if  
18 a reference was ever made to any particular type of game,  
19 it would be for classification purposes.

20 MR. VITTUM: Your Honor, I'll object to this  
21 entire line of questioning. It is outside the scope  
22 of the limited purpose of this remand, and this  
23 witness' testimony as to his legal opinion about how  
24 Pac-Man was misused in that ad is certainly not a  
25 matter that is before the Court in terms of that stay.

1 MR. BEGGS: Your Honor, may I speak to that?

2 THE COURT: Surely.

3 MR. BEGGS: The Court of Appeals in its order  
4 of March 11, 1982, as I read it, on page 2 in the  
5 second paragraph refers to controlling circumstances  
6 not appearing in the record previously before the  
7 Court of Appeals, and in the next sentence they  
8 refer to the defendants' continued advertising.

9 Now, what we had tried to make clear at  
10 the earlier proceedings in this Court on the motion  
11 for preliminary injunction was that this was not  
12 defendants' advertising. Mr. Giese spoke about it,  
13 but we didn't have the testimony of the people who  
14 were responsible, and what we propose to show is  
15 that -- oh, there is one other item I wanted to  
16 mention. This advertisement which the witness is  
17 testifying about was attached by the plaintiffs to  
18 their motion to vacate your stay of the injunction.  
19 What we want to show as clearly as we know how to  
20 show is this is not the defendants' advertising and  
21 the Court of Appeals seems to be confused on that.

22 Q What is the policy of Minnesota State and

23 Showtime Video on that?

24 A That if a game is ever advertised, it is usually

25 for classification purposes and that we sell the game on



1 MR. VITTUM: Your Honor, the defendants at the  
2 trial in November made these same facts about  
3 Minnesota Fats, the fact that Minnesota Fats was not  
4 a part of the cooperative advertising program of  
5 record.

6 The Court of Appeals made that point that  
7 the fact that retailers, whether or not authorized  
8 and whether or not directed by North American, the  
9 fact that retailers are continuing to misuse the  
10 Pac-Man mark is important as a matter of law, so I  
11 would submit this entire line of testimony is  
12 irrelevant for purposes of this remand.

13 THE COURT: The objection will be overruled.  
14 Let's proceed.

15 MR. BEGGS: May I have that response back.

16 (Record read.)

17 BY MR. BEGGS:

18 Q So as far as you know, Mr. Frederico, does  
19 Minnesota Fats normally refer to K. C. Munchkin and Pac-Man  
20 in the same ads for Odyssey?

21 A No.

22 Q What is the policy of Minnesota Fats and  
23 Showtime Video on that?

24 A That if a game is ever advertised, it is merely  
25 for classification purposes and that we sell the game on

1 its own merits.

2 Q So far as -- Miss Wagner reports to you, is  
3 that correct?

4 A She normally reports to Michael Friedman, but  
5 in his absence she reports to me.

6 Q Did you clear this ad from her?

7 A No.

8 MR. BEGGS: Your Honor, if I may, I would like  
9 to hand up a copy of the document we have just been  
10 talking about.

11 THE COURT: All right.

12 MR. BEGGS: And I'm about to inquire of the  
13 witness on Exhibit 28, which is another ad. I would  
14 like to hand up a copy of that now also and I have  
15 just given a copy to opposing counsel.

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Q Mr. Frederico, I show you a document which purports to be a copy of an ad we have just marked as Defendants' Exhibit 28 for identification, and I also show you a page from the Chicago Tribune dated March 12, 1982.

Is Exhibit 28 a copy of the ad which appeared in the Chicago Tribune on that day?

A Yes.

Q Is that a Minnesota Fats ad, the March 12 ad?

A Yes.

Q What changes, with respect to the advertising of the Magnavox Video System, do you see between Exhibit 28, the March 12 ad, and Exhibit 27, which is the March 4 ad?

A Well, there is no reference to K. C. Munchkin whatsoever.

Q How did that come about?

A I was notified by Magnavox that we should discontinue that practice.

Q What practice are you referring to?

A Of comparing K. C. Munchkin to Pac-Man in any way whatsoever.

Q And does this Exhibit 28 reflect the change in practice of Minnesota Fats?

A Yes.

MR. BEGGS: Your Honor, I am about to inquire of the witness on our next exhibit, Exhibit 29,

1 and I would like to pass a copy to the Court.

2 THE COURT: All right.

3 BY MR. BEGGS:

4 Q Mr. Frederico, I show you a copy of a document  
5 which purports to be an ad for Showtime Video which we have  
6 just marked as Defendants' Exhibit 29, and I also show you  
7 a copy of a page from the Chicago Tribune dated March 4,  
8 1982.

9 Is Exhibit 29 a copy of the Showtime Video  
10 ad that appeared on March 4 in the Chicago Tribune?

11 A Yes.

12 Q Were the circumstances of this Showtime Video  
13 ad for March 4, which we have just marked as Defendants'  
14 Exhibit 29, the same as you referred to and described  
15 earlier in your testimony with respect to the Minnesota  
16 Fats ad that appeared on March the 4th?

17 A Yes.

18 Q Was that ad of Showtime Video, which you have  
19 in front of you, Defendants' Exhibit 29, the one on  
20 March 12 -- I am sorry -- the one on March 4, was that  
21 subsequently changed?

22 A Yes.

23 MR. BEGGS: Your Honor, I am about to ask the  
24 witness on our next document which we have just marked  
25 Defendants' Exhibit 30 for identification.

1 THE COURT: All right.

2 BY MR. BEGGS:

3 Q Mr. Frederico, I show you a copy of a document  
4 which we have just marked Defendants' Exhibit 30 for  
5 identification and also, a page from the Chicago Tribune  
6 dated March 12, 1982.

7 Is the exhibit, Defendants' Exhibit 30,  
8 a copy of a Showtime Video ad that appeared in the  
9 Chicago Tribune on March the 12th, 1982?

10 A Yes.



1 Q Does the Showtime Video ad, Defendants'  
2 Exhibit 30, reflect the change that you referred to a moment  
3 ago in the advertising of Showtime Video from the March 4  
4 ad?

5 A Yes, it does.

6 Q Were the circumstances that you described in your  
7 testimony earlier about changing the form of the advertise-  
8 ments for March 12 -- from March 4 to March 12 on the  
9 Minnesota Fats set of ads, are those the same set of  
10 circumstances applicable to those two Showtime Video ads,  
11 Defendants' Exhibit 29 and 30?

12 A Yes.

13 MR. BEGGS: No further questions, your Honor.

14 THE COURT: Cross examination.

15 MR. VITTUM: Thank you, your Honor.

16 CROSS EXAMINATION

17 BY MR. VITTUM:

18 Q Mr. Frederico, does Minnesota Fats have any  
19 affiliation with a video retailer by the name of Video, Etc.  
20 in Deerfield and Skokie?

21 A No.

22 Q Does Minnesota Fats have any affiliation with  
23 a video retailer known as American Sales in Ridgeview?

24 A No.

25 Q Does Minnesota Fats have any affiliation with

1 Park Magnavox?

2 A No.

3 Q Does Minnesota Fats --

4 MR. BEGGS: I am going to object to this  
5 continued line of questioning, your Honor, unless  
6 there is some relevancy to counsel's questions.

7 THE COURT: What is the -- he wasn't asked about  
8 any of these others.

9 MR. VITTUM: Correct, your Honor. The point  
10 defendants were making was defendant North American  
11 had not authorized any of the advertising actions of  
12 Minnesota Fats. I am pointing out there is no  
13 relationship between Minnesota Fats and other  
14 retailers for which confusion evidence was provided  
15 at the original hearing.

16 I have only two more to complete the  
17 record.

18 MR. BEGGS: I don't see how that's relevant.

19 THE COURT: We will see. The objection is  
20 overruled. We will hear the argument afterwards.

21 Go ahead.

22 BY MR. VITTUM:

23 Q Does Minnesota Fats have any affiliation with  
24 Video Track retailer in South Holland?

25 A No.

1 Q Mr. Frederico, your testimony was that between  
2 the time of the March 4 advertisements, which were  
3 Defendants' Exhibits 27 and 29, and the advertisements  
4 that appeared in the March 12 Chicago Tribune, Defendants'  
5 Exhibits 28 and 30, for identification, you were able to  
6 effect a change in the contents of the advertising insofar  
7 as it pertained to the Magnavox Odyssey system, is that  
8 correct?

9 A Yes.

10 Q You were able to effect that change in  
11 advertising within that very short period of time without  
12 difficulty, isn't that correct?

13 A Yes.

14 Q Your testimony with respect to Defendants'  
15 Exhibit 27 was that Atari paid for the ad, is that correct?

16 A Yes.

17 Q Did Atari pay for the entire ad?

18 A No.

19 Q Atari did not pay for the advertising of the  
20 Magnavox Odyssey portion of the advertisement, is that  
21 correct?

22 A Yes.

23 A Yes.

24 A Yes.

25 A Yes.

1 Q You indicated that Minnesota Fats was instructed  
2 by North American Philips or Magnavox to change the  
3 reference in the advertising to Pac-Man, isn't that  
4 correct?

5 A Yes.

6 Q Didn't they indicate to you that that change  
7 should be made because it was improper to refer to Pac-Man  
8 in the advertising with respect to K. C. Munchkin?

9 A Yes.

10 Q Isn't it a fact that that is the second  
11 occasion at which Minnesota Fats was instructed by North  
12 American Philips or Magnavox to stop referring to Pac-Man  
13 in the advertising for K. C. Munchkin?

14 A Yes.

15 Q The other occasion was back in late November,  
16 early December, wasn't it?

17 A I believe so.

18 Q You are familiar, are you not, Mr. Frederico,  
19 that the Atari Pac-Man cartridge is now being introduced?

20 A Yes.

21 Q Has Minnesota Fats run any advertising for the  
22 Atari Pac-Man cartridge?

23 A Yes.

24 Q You are aware of the popularity associated  
25 with the Atari Pac-Man cartridge, aren't you?

A Yes.

Q The nature of your advertising, sir, was, in effect, that Minnesota Fats will have the Atari Pac-Man cartridge in early April but the consumer can come in and buy the cartridge from Minnesota Fats now and have their name taken and be called when the product finally arrives on the shelves, isn't that right?



1 MR. BEGGS: I object to the long question, your  
2 Honor, particularly since it started out something about  
3 the nature of the advertising.

4 MR. VITTUM: I'll rephrase, your Honor.

5 THE COURT: All right, the question is with-  
6 drawn. Rephrase the question.

7 BY MR. VITTUM:

8 Q Mr. Frederico, would you describe the basic  
9 message conveyed by the Minnesota Fats advertising for the  
10 Atari Pac-Man cartridge?

11 MR. BEGGS: So far as he intends, your Honor.

12 THE COURT: Of course, that's the only extent  
13 the witness can testify. Yes, that's understood,  
14 isn't it?

15 MR. VITTUM: Yes, sir.

16 THE COURT: All right, proceed.

17 BY THE WITNESS:

18 A That if a customer gives us a pre-order which  
19 is registering to purchase the cartridge in advance of its  
20 release date, that they will be assured to get it as soon  
21 as it does come out.

22 BY MR. VITTUM:

23 Q During what period of time did you run that  
24 advertising for the Atari Pac-Man cartridge?

25 A I don't remember the exact dates. I believe it

1 was about a week or two ago.

2 Q It was the period before you started advertising  
3 again for the K. C. Munchkin cartridge, isn't that right?

4 A I believe so. I'm not really sure.

5 Q Is K. C. Munchkin a Pac-Man type game?

6 A Yes.

7 Q Is K. C. Munchkin Odyssey's Pac-Man?

8 A No.

9 Q You're aware that retail clerks in your store  
10 have so described it, are you not?

11 MR. BEGGS: Your Honor, there is no testimony  
12 on what his awareness of what --

13 THE COURT: I'm going to sustain that objection  
14 for the reason it goes way beyond the scope of the  
15 direct. His direct examination was limited to these  
16 advertisements. The objection is sustained.

17 BY MR. VITTUM:

18 Q Mr. Frederico, I show you a document that I have  
19 marked for identification as Plaintiffs' Exhibit 21.

20 A Yes, Your Honor, may I hand up a copy of this.

21 Mr. Frederico, did you receive a copy of  
22 Plaintiffs' Exhibit 21 for identification, a document  
23 addressed to "Dear Odyssey Dealer"?

24 A Yes.

25 Q When did you receive it?

1 A Last week.

2 Q Do you recall what day?

3 A No.

4 MR. VITTUM: No further questions, your  
5 Honor.

6 REDIRECT EXAMINATION

7 BY MR. BEGGS:

8 Q Mr. Frederico, how does Minnesota Fats divide  
9 in its own mind a dollar payment that applies to an  
10 advertisement that you put in the paper?

11 A The line space of the newspaper ad that's taken  
12 up by a particular vendor gets charged back that amount.

13 Q Is that the way Minnesota Fats does it in its  
14 accounting?

15 A Yes.

16 Q And so that the upper portion of that ad on  
17 March 4th -- or at least any portions here that refer to  
18 Atari out of that whole ad, those were the portions that  
19 Atari paid for or intended to pay for, is that correct?

20 A Yes.

21 THE COURT: Is there an objection?

22 MR. VITTUM: I am going to object on grounds  
23 of relevance, your Honor, but if counsel is finished  
24 with the line --

25 THE COURT: All right, go ahead.

MR. BEGGS: I'm finished with it, your Honor.

BY MR. BEGGS:

Q Did you understand what Mr. Vittum referred to when he asked you something like this: Is reference to Pac-Man in an Odyssey advertisement for K. C. Munchkin improper?

A Did you understand what he meant by the term "improper"?

A No, not exactly.

MR. BEGGS: No further questions.

THE COURT: Any further questions?

4/2

1 MR. VITTUM: Yes.

2 RECROSS EXAMINATION

3 BY MR. VITTUM:

4 Q Mr. Frederico, you were told by North American  
5 Phillips that reference to Pac-Man in a K. C. Munchkin ad  
6 was improper?

7 A After the ad ran?

8 Q Yes.

9 A Yes, I was told that.

10 MR. VITTUM: No further questions, your Honor.

11 THE COURT: Anything else of this witness?

12 MR. BEGGS: May I have just a moment, please?

13 THE COURT: Yes.

14 (Brief pause.)

15 MR. BEGGS: Nothing else from this witness.

16 THE COURT: All right, thank you, Mr. Frederico.

17 (Witness excused.)

18 THE COURT: Your next witness? You gentlemen  
19 remember that I told you that at a few minutes to 10:00  
20 o'clock we will have to adjourn these proceedings.

21 MR. BEGGS: I'll move as quickly as I can.

22 THE COURT: I am just telling you. I'm not  
23 rushing you. We will just have to come back to this,  
24 because I couldn't postpone the other case I had set for  
25 10:00 o'clock.



1 All right, let's proceed.

2 MR. BEGGS: I would like to call Ms. Dawn  
3 Wagner, please, as the next witness for the defendant.

4 THE COURT: Come forward and be sworn.

5 (Witness sworn.)

6 THE CLERK: Be seated, please, state your name,  
7 spell your name, lean forward, speak directly into that  
8 microphone, keep your voice up.

9 DAWN WAGNER,  
10 called as a witness by the defendants herein, having been  
11 first duly sworn, was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. BEGGS:

14 Q Will you please state your name and address.

15 A My name is Dawn Wagner, D-a-w-n, W-a-g-n-e-r,  
16 1110 64th Street, LaGrange, Illinois.

17 Q Are you employed, Ms. Wagner?

18 A Yes, I am.

19 Q By whom?

20 A Roselle Industries.

21 Q What is your position there?

22 A Advertising manager.

23 Q Does that relate to any particular companies?

24 A Yes, I do the advertising for Minnesota Fats and  
25 for Showtime Video.

1 Q How long have you been in that position?

2 A Three weeks.

3 Q Whom do you report to?

4 A I report to Michael Friedman. For the last two  
5 weeks I have been reporting to Vincent Frederico in  
6 Michael's absence.

7 Q I show you the Tribune ads for March 4, 1982  
8 and -- which is Defendants' Exhibit 27, and I ask you  
9 what was Defendants' Exhibit 27, what was your connection,  
10 if anything, with the March 4th ad of Minnesota Fats?

11 A I put the ad together.

12 Q Did you receive instructions to put it  
13 together?

14 A Vague instructions. Mr. Frederico instructed  
15 me to take a look at previous ads because I was so new  
16 and pretty much take what I found from these ads to put  
17 the March 4th ad together.

18 Q Then what did you do? Did you follow those  
19 instructions?

20 A Yes, I did.

21 Q Now, is there any particular reason that you know  
22 of for the phrase which appears in Defendants' Exhibit 27,  
23 "Odyssey lets you play Pac-Man now with K. C. Munchkin"?

24 A Well, as I said, I looked at previous ads and  
25 I did find an ad that said "K. C. Munchkin, a Pac-man type

1 game." I changed it just to suit myself to make it sound  
2 a little snappier.

3 Q Well, have you played K. C. Munchkin?

4 A No, I haven't.

5 Q Have you seen it?

6 A No.

7 Q Were you aware of any instructions that a  
8 reference to Pac-Man should or should not be made in ads  
9 for K. C. Munchkin?

10 A No, I wasn't.

11 Q Have you received any instructions since the  
12 time of that ad, March 4th?

13 A Yes.

14 Q From whom?

15 A From Mr. Frederico.

16 Q What were those instructions?

17 A Not to do that again.

18 Q I show you Defendants' Exhibit 28, which is  
19 the March 12th Minnesota Fats ad. Was that ad also made  
20 up by you?

21 A Yes, it was.

22 Q Is there any reference to Pac-Man and any  
23 material connected with Odyssey?

24 A No.

25 Q Is that pursuant to the instructions you

1 received from Mr. Frederico?

2 A Yes.

3 Q I show you the advertisement dated -- which  
4 appeared March 4, 1982 for Showtime Video, Defendants'  
5 Exhibit 29. Did you make up that ad too?

6 A Yes, I did.

7 Q Were the circumstances which you just described  
8 with respect to the March 4th Minnesota Fats ad the same  
9 concerning the Showtime Video ad?

10 A Yes.

11 Q And I show you Defendants' Exhibit 30, which is  
12 the March 12, 1982 Showtime Video ad.

13 Did you make up that ad too?

14 A Yes.

15 Q Is this Defendants' exhibit-- are the  
16 circumstances with respect to your making up Defendants'  
17 Exhibit 30 the same as you described with respect to the  
18 March 12th Minnesota Fats ad?

19 A Yes.

20 MR. BEGGS: No further questions, your Honor.

21 THE COURT: Cross examination?

22 MR. VITTUM: Your Honor, I would move to have  
23 all of this witness' testimony stricken for the same  
24 reason I argued before. This testimony has no bearing  
25 on the four elements that have to be established by  
the defendant to carry its burden of showing that a  
stay is appropriate.

1 MR. BEGGS: Our response is the same, your Honor.

2 THE COURT: Motion is denied.

3 MR. BEGGS: Thank you.

4 THE COURT: You are going to cross examine?

5 MR. SPRINGER: Yes, sir. Good morning, your Honor.

6 David Springer.

7 THE COURT: All right.

8 CROSS EXAMINATION

9 BY MR. SPRINGER:

10 Q Ms. Wagner, you didn't make up the earlier ads  
11 that you referred to in order to come up with the March 4  
12 ad, did you?

13 A No, I was new.

14 Q You looked at old ads that other people had done?

15 A Yes.

16 Q Who did those previous ads?

17 A I don't know. I wasn't there.

18 Q But you concluded on the basis of your review  
19 of the previous ad that it would be okay to refer to  
20 K.C. Munchkin as Odyssey's Pac-Man, right?

21 A Yes.

22 Q Now you were told at some point that it was wrong  
23 to refer to K.C. Munchkin as Odyssey's Pac-Man, weren't you?

24 A Yes.

25 Q Were you told before you made up the March 4 ad

1 that Minnesota Fats had been told back in November that it  
2 was wrong to refer to K.C. Munchkin as Odyssey's Pac-Man?

3 A No.

4 Q Nobody told you that they were told back in  
5 November that it was wrong to confuse those two products?

6 A No.

7 MR. BEGGS: Objection, your Honor. There is no  
8 basis.

9 THE COURT: Objection is sustained. Objection is  
10 sustained, and the answer is stricken.

11 BY MR. SPRINGER:

12 Q Now it was no problem for you, once you learned  
13 it was wrong to refer to Odyssey's game as -- strike that.

14 It was no problem for you to change the ads once  
15 you learned that it was wrong to refer to K.C. Munchkin as  
16 Pac-Man, isn't that right?

17 MR. BEGGS: Your Honor, may we have that question,  
18 please, without the preface. We have a long preface  
19 here before we get to the question which I am afraid  
20 characterizes the question.

21 THE COURT: There is no jury here for that purpose.

22 I do have a little trouble with the word  
23 "wrong." I don't understand what that word means in  
24 the context of this case.

25 State that for the record. As I recall,



1 there was a communication -- I forget the nature of  
2 the communication. I don't think the word wrong ever  
3 appeared in that communication, but if someone will  
4 show me that. Why don't you get that communication.

5 MR. VITTUM: Just one moment, your Honor.

6 BY MR. SPRINGER:

7 Q Well, you understand that something that is  
8 improper is wrong, don't you?

9 A Yes.

10 MR. BEGGS: Your Honor, I guess that's a general  
11 question, but --

12 THE COURT: I am going to sustain the objection.  
13 Let's look at the letter and see what the letter says.

1 MR. SPRINGER: I can rephrase the question,  
2 your Honor.

3 THE COURT: Why don't you rephrase the question  
4 so we can finish the witness.

5 BY MR. SPRINGER:

6 Q At some point did you learn that it was improper  
7 to refer to K. C. Munchkin as a Pac-Man game? Didn't you?

8 A Yes.

9 MR. BEGGS: Same objection, your Honor, unless he  
10 is going to what the witness' circumstances were  
11 on thinking of this kind.

12 THE COURT: Well, this witness has described  
13 her situation. She became a new employee. She was  
14 told to prepare an ad.

15 She went to the old ad, and she looked at  
16 them and she prepared this one. She didn't know  
17 anything about these communications prior to March 4,  
18 1982.

19 MR. VITTUM: Excuse me, your Honor. The  
20 communication that was sent to the dealers by Odyssey  
21 was a defendants' exhibit that was in evidence from  
22 last fall. I don't have copies of the record,  
23 defendants' exhibits.

24 MR. BEGGS: Our exhibits are still in the  
25 Court of Appeals.

1 MR. VITTUM: You didn't save any copies?

2 MR. BEGGS: We didn't bring a set of copies.

3 MR. VITTUM: I am sorry. I have found a copy,  
4 your Honor.

5 THE COURT: What is the letter?

6 MR. BEGGS: Excuse me. I may be in error.  
7 Which one are you referring to?

8 MR. VITTUM: Defendants' Exhibit 26.

9 MR. BEGGS: 26?

10 MR. VITTUM: Your Honor, may I hand you a copy  
11 of Defendants' Exhibit 22 in evidence.

12 THE COURT: This is the letter, isn't that right?

13 MR. VITTUM: That's correct.

14 THE COURT: Let's take a look at it and see.  
15 See what it says.

16 MR. BEGGS: 22?

17 MR. VITTUM: 22 and 26 are the same.

18 THE COURT: You see, you read this letter and  
19 you don't get any context of the word wrong in this  
20 letter. I don't anyway. Nor do I get any meaning  
21 of this letter as importing or suggesting impropriety  
22 of any kind.

23 This letter is written by defendants'  
24 general counsel telling them that "It is our position  
25 that we must insist that you not make any reference

1 or" -- there is nothing here. There is no imputation  
2 in this letter.

3 The word wrong has a certain imputation  
4 just as the word improper has. I don't know how you  
5 are going to phrase this question to keep away from  
6 the problem I detect in the phrasing of the question,  
7 but look at the letter and let's strictly follow the  
8 spirit and intent of the letter.

9 BY MR. SPRINGER:

10 Q Ms. Wagner, at some point you were told to  
11 stop referring to K. C. Munchkin in connection with Pac-Man,  
12 weren't you?

13 A Yes.

1 Q And after you were told that, it was no problem  
2 for you to change the Minnesota Fats and the Showtime  
3 video ads to delete all references to Pac-Man in connection  
4 with K.C. Munchkin, isn't that right?

5 A Yes.

6 Q You could do that on a short period of time with  
7 the minimal amount of cost to you, right?

8 A Yes.

9 MR. SPRINGER: No further questions, your Honor.

10 THE COURT: Any further questions?

11 MR. BEGGS: No further questions.

12 THE COURT: Thank you, Ms. Wagner. All right.

13 (Witness excused.)

14 THE COURT: Your next witness.

15 MR. BEGGS: We would like to call Ms. Hunton, please,  
16 your Honor.

17 THE COURT: Ms. Hunton, come forward.

18 LINDA HUNTON,

19 called as a witness on behalf of the defendants, having  
20 been first duly sworn, was examined and testified as follows:

21 THE CLERK: Be seated, please. State your full  
22 name, spell your last name, lean forward and speak  
23 directly into that microphone. Please keep your voice  
24 up.

Hunton - direct

DIRECT EXAMINATION

BY MR. BEGGS:

Q Would you state your full name and address, please.

A My name is Linda Hunton. I live at 215 East Chestnut, Chicago.

Q Are you employed?

A Yes, I am.

Q And what is your position?

A I am a legal secretary at Newman, Williams, Anderson and Olson.

Q And how long has that been?

A A little bit more than three years.

Q Did you have occasion to purchase a Pac-Man cartridge, recently?

A Yes, I did.

Q Were you instructed to do so?

A Yes, I was.

Q When was that?

A On Saturday.

Q This past Saturday?

A Yes.

Q Who instructed you to?

A Mr. Anderson.

Q Mr. Anderson who is sitting at counsel table here?

A Yes.



Q What were the instructions that you received?

A He showed me a copy of an advertisement from a Pacific Stereo from the Chicago Tribune, asked me to call the local stores and see if they had a Pac-Man cartridge, and if they did, to go and purchase it.

MR. BEGGS: Your Honor, I am about to ask the witness about this advertisement. I will pass a copy up to the Court.

We have just marked it as Defendants' Exhibit 31 for identification.

BY MR. BEGGS:

Q Ms. Hunton, I show you a newspaper page from the Chicago Tribune dated Friday, March 12, 1982 and I hand you the exhibit that we have just marked as Defendants' Exhibit 31 for identification and ask you whether 31 is a copy of the Pacific Stereo ad that appeared in the Chicago Tribune there and is the ad you just referred to?

A Yes, it is.

Q Did you -- you said you then went there and purchased the cartridge?

A I telephoned the store in the New Town area and ascertained if they had the cartridge available, and then took a cab there and bought the cartridge.

Q What did you do with the cartridge after you bought it?

A When I returned at the office, I gave it to Mr. James Williams.

1 MR. BEGGS: And I will represent, your Honor,  
2 that our office has had the cartridge in its posses-  
3 sion ever since. If we need to tie that up, I guess  
4 we can.

5 Is there any objection?

6 MR. VITTUM: Your Honor, I am not sure I am  
7 entirely clear about what the purpose of this entire  
8 interrogation is of this witness.

9 THE COURT: Why don't we wait. Maybe we will find  
10 out.

11 MR. VITTUM: All right.

12 THE COURT: After all, they have a right to  
13 proceed with the evidence.

14 MR. BEGGS: The point is --

15 THE COURT: If they don't get to the point you  
16 think they should reach, we'll see it at that time.

17 Proceed now. The question is being raised  
18 whether it's necessary to call any witnesses to show  
19 that that is the cartridge that this witness said she  
20 purchased. Why don't you show it to her. Maybe she  
21 can recognize the cartridge, the package.

22 Is there any dispute about this?

23 MR. VITTUM: No, sir. Not at all.

24 THE COURT: There is no dispute about it. It is  
25 conceded that is the cartridge the witness said she

Hunton - direct

1 purchased on March 12, 1982.

2 Let's proceed now.

3 MR. BEGGS: Your Honor, we will mark the  
4 cartridge, which is now shaking out of the inside  
5 of the box, as Defendants' Exhibit 32.

6 THE COURT: All right.

7 MR. BEGGS: Your Honor, we will mark the box  
8 that it came in as Defendants' Exhibit 33.

9 THE COURT: All right.

10 MR. BEGGS: And we will also mark the catalog  
11 which was inside the box as Defendants' Exhibit 34  
12 and the instruction booklet which was inside the  
13 box as Defendants' Exhibit 35.

14 BY MR. BEGGS:

15 Q Now, Ms. Hunton, within the last 18 hours or so  
16 have you had occasion to investigate the availability of  
17 a Pac-Man cartridge in any store in Chicago?

18 A Yes, I have.

19 Q When was that?

20 A That was yesterday evening.

21 Q Were you instructed to do so?

22 A Yes, I was.

23 Q Who gave you those instructions?

24 A You did.

25 Q And what were those instructions?

1 A You asked me to call a K-Mart store located on  
2 South Pulaski Avenue and inquire if they had any Pac-Man  
3 cartridges.

4 Q What did you do, if anything, to carry those  
5 instructions out?

6 A I looked up the phone number, called the store  
7 and asked that question.

8 Q What was your understanding when you asked that  
9 question of what the situation was at the store?

10 A The person I spoke to said they had received  
11 the cartridges Friday night or Friday, and by Friday night  
12 they had about three left and they were sold out by  
13 Saturday, and if I called back the end of the week that  
14 she could probably tell me when and if they would be  
15 getting more.

16 MR. BEGGS: One moment, your Honor.

1 MR. BEGGS: No further questions.

2 THE COURT: Any cross examination?

3 MR. VITTUM: None, your Honor.

4 THE COURT: All right. Thank you, Ms. Hunton.

5 (Witness excused.)

6 THE COURT: We have just a little less than  
7 ten minutes. Do you want to start with a witness?

8 MR. ANDERSON: Your Honor, we can stop right now.  
9 The next witness would be -- we asked for Mr. Moone. I under-  
10 stand that he is not being produced, but Mr. Paul is.  
11 It might take more than ten minutes, so if you would like  
12 to adjourn now --

13 THE COURT: You may stay if you wish. We  
14 will just have to watch and see what happens with the case  
15 I'm going to call at 10:00 o'clock.

16 MR. BEGGS: I have one thing. Mr. Frederico  
17 and Ms. Wagner, if there are no further questions to be  
18 asked of them, I would like to excuse them.

19 THE COURT: They have been excused.

20 MR. BEGGS: Would it be proper before they go  
21 to offer our exhibits?

22 THE COURT: Certainly, offer the exhibits and  
23 I'll hear if there are any objections.

24 Exhibits 27, 28, 29 and 30, those were the  
25 advertisements.

1 MR. VITTUM: No objection, your Honor.

2 THE COURT: All right, they are admitted in  
3 evidence.

4 (Said exhibits were thereupon received  
5 into evidence as Defendants' Exhibits  
6 27, 28, 29 and 30.)

7 MR. BEGGS: 31, 32 -- I'm sorry --

8 THE COURT: You marked them 31, that's the --  
9 31, 32, 33, and 34.

10 MR. VITTUM: And 35.

11 THE COURT: And 35.

12 MR. VITTUM: No objection.

13 THE COURT: And 35.

14 MR. VITTUM: No objection.

15 THE COURT: They are admitted in evidence.

16 (Said exhibits were thereupon received  
17 into evidence as Defendants' Exhibits  
18 31, 32, 33, 34 and 35.)

19 THE COURT: All right, we will adjourn and  
20 reconvene soon after I finish with the other case.

21 (Recess taken.)  
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MR. ANDERSON: Your Honor, we requested to have Mr. Moone appear here today as a witness called by the defendants and we understand that the plaintiffs are not producing Mr. Moone but instead are producing Mr. Charles S. Paul.

THE COURT: All right.

MR. VITTUM: That is correct.

MR. ANDERSON: We will call that witness at this time.

(Witness sworn.)

THE CLERK: Be seated, please, and state your name, spell your name, lean forward, speak to that microphone, keep your voice up.

THE WITNESS: My name is Charles S. Paul. Last name is spelled P-a-u-l.

MR. ANDERSON: Mr. Paul is being called as an adverse witness.

CHARLES S. PAUL,  
called as an adverse witness by the defendants herein,  
having been first duly sworn, was examined and testified  
as follows:

DIRECT EXAMINATION

BY MR. ANDERSON:

Q Mr. Paul, you testified in these proceedings  
on November 25, 1981 on behalf of the plaintiffs, is that  
correct?

A That's correct.

Q Will you please again state what your position  
is with Atari?

A I'm senior vice president and general counsel  
of the corporation.

Q I would like to hand you Defendants' Exhibits  
32, 33, 34 and 35. Can you identify those as a product of  
Atari?

1           A     Defendants' Exhibit 32 appears to be a Pac-Man  
2 cartridge for use with the Atari video computer system.

3                     Defendants' Exhibit 33 appears to be a  
4 package in which that cartridge may have been delivered.

5                     Defendants' Exhibits 34 and 35 appear to  
6 be catalog materials which may have been contained in that  
7 package.

8           Q     Have you seen other copies of each of the  
9 exhibits before today?

10          A     I'm not sure I understand.

11          Q     Have you seen a Pac-Man cartridge before today?

12          A     Yes.

13          Q     Is that a Pac-Man cartridge, as far as you  
14 understand it and as far as you recognize it, made by  
15 Atari?

16          A     It appears similar to others I have seen.

17          Q     Do you have any reason to believe it isn't?

18          A     No.

19          Q     With respect to the carton and the catalog and  
20 the instruction manual, is that also true, they appear  
21 to be products of Atari?

22          A     They appear to be similar to others that I have  
23 seen, right.

24          Q     In November when you testified Atari was not  
25 shipping Pac-Man cartridges, is that correct?

1 A I believe that's correct, yes.

2 Q Atari is now selling and shipping Pac-Man  
3 cartridges, is that correct?

4 A That's correct.

5 Q In fact, Pac-Man cartridges are now being sold  
6 in Chicago, is that correct?

7 A As far as I know.

8 Q And in St. Louis?

9 A As far as I know.

10 Q And in Houston?

11 A I believe they are being sold nationwide.

12 Q Nationwide. And they are being sold to Sears,  
13 Roebuck and Company by Atari, is that correct?

14 A That's correct.

15 Q And to J. C. Penney, is that correct?

16 A That is also correct.

17 Q And to the K-Mart, is that correct?

18 A I believe that's also correct, yes.

19 Q And none of those companies have refused to  
20 buy or rejected the purchase of Pac-Man cartridges, is  
21 that correct?

22 A Not to my knowledge.

23

24

25

1 Q Are they each advertising and actually selling  
2 Pac-Man cartridges to the public, as far as you know?

3 A I have seen the advertisements from each of  
4 those retailers, yes.

5 Q How many Pac-Man cartridges have been shipped  
6 so far by Atari?

7 A I believe in excess of one million units.

8 Q And those are all sold also, is that right?

9 A Yes.

10 Q When were they first shipped by Atari?

11 A I believe the cartridges were first available at  
12 retail on Monday of last week. This is the very beginning  
13 of our product introduction.

14 Q Is it correct that the most popular cartridge  
15 prior to Pac-Man was Space Invaders?

16 A In terms of what?

17 Q Sales, units.

18 A I'm not sure. It's very close.

19 Q Very close to what?

20 A I don't know what the prior leader in sales was  
21 to Pac-Man, no.

22 Q But your Space Invaders was one of the leaders?

23 A Was one of the most popular.

24 Q Is it correct that you shipped more Pac-Man  
25 cartridges in the first month than Space Invaders in an

1 entire year, your best year?

2 A I'm not sure.

3 Q That was reported in the Wall Street Journal  
4 for March 12, 1981, and I'll mark a copy of that as  
5 Defendants' Exhibit 36.

6 Mr. Paul, I refer you to the first column,  
7 the second paragraph under "word of mouth waiting list,"  
8 where the article states a quotation:

9 "'We'll ship more Pac-Man cartridges in  
10 the first month than Space Invaders sold in the first  
11 year,' says a Warner executive. More than one  
12 million Space Invader cartridges were sold in that  
13 first year."

14 Warner is the parent company of Atari, is  
15 it not?

16 A That's correct.

17 Q Does this refresh your recollection at all with  
18 respect to any information in that regard?

19 A This doesn't refresh my recollection. I will  
20 explain if I may. I don't know who a Warner executive was  
21 that may have said this. I also believe in reading this  
22 that my prior answer that we sold more than one million  
23 units is consistent with this statement.



Q Thank you.

Now in the same Wallstreet Journal article in the third column, the middle of the page, there is a paragraph that starts, "Mr. Bell says he never before has seen the likes of consumer response to Pac-Man."

In St. Louis ads announcing the arrival last Saturday by 10:30 a.m. last Saturday, one St. Louis store ran out of games and the other two were out by noon.

In Chicago ads run in Wednesday evening's paper, "By 10:00 a.m. yesterday, Sears had sold out."

Is that correct as far as you know?

MR. VITTUM: Objection, your Honor. I don't know that the proper foundation has been laid to ask a question of this witness with respect to those hearsay --

THE COURT: He is only asking him if this is true. If he knows whether it's true or not, he can say so.

THE WITNESS: I do not know whether that is true. I do know, however, this is a critical period of product introduction which this article clearly implies.

THE COURT: All right.

BY MR. ANDERSON:

Q Do you have any reason to think it's untrue?

A I don't believe everything I read in the press.

Q Can you answer the question?

A No, I don't.

1 THE COURT: All right.

2 BY MR. ANDERSON:

3 Q Mr. Paul, is it true that J.C. Penney Company  
4 has run a Pac-Man promotion or is running a Pac-Man promo-  
5 tion which is their largest retail promotion for the entire  
6 year with respect to any product?

7 A J. C. Penney's promotion that has been planned  
8 for the Pac-Man cartridge will be very close to their  
9 largest for this year of any product. It's very important  
10 to J. C. Penney. They are very interested.

11 Q What is Atari's present production for Pac-Man  
12 cartridge sales for the next months?

13 MR. VITTUM: Your Honor, may I at this point  
14 interpose an objection. The amount or extent of  
15 Atari's success with the popular --

16 THE COURT: That objection will be sustained.  
17 Let's get down to a showing of why this injunction  
18 should be stayed.

19 Now that objection is sustained.

20 BY MR. ANDERSON:

21 Q Mr. Paul, from your knowledge of the home video  
22 market, is it correct that Atari has captured about 80  
23 percent of that market followed by Mattel's Intellelevision  
24 with roughly 15 percent and Magnavox's Odyssey with 3 or  
25 4 percent?

Paul - direct

MR. VITTUM: Objection, your Honor. That also is irrelevant, I would submit.

THE COURT: Objection is sustained.

MR. ANDERSON: Your Honor, may I address that?

THE COURT: Go ahead.

Paul - direct

MR. ANDERSON: I think that is definitely relevant on the question of irreparable harm, potential injury, relative balance of the injury between the two parties.

THE COURT: All right. Let me hear the question again, in view of that.

Would you read the question.

(Record read.)

MR. VITUM: Your Honor, I still submit that's irrelevant to the narrow issues that are before the Court on remand. The question of Atari's relative size to that of the defendant Odyssey has no relevance as to the particular effect the injunction dealing with K.C. Munchkin would have, and that's the only issue that's before the Court.

MR. ANDERSON: Your Honor, that's tantamount to saying that it's not relevant whether the elephant can --

THE COURT: The objection is overruled. Let's proceed. The only way I am going to resolve this matter is to hear evidence.

Go ahead now.

BY MR. ANDERSON:

Q Will you please answer the question, Mr. Paul.

A Sir, I have no idea what the relevant market or the relative market shares are.

1 Q Mr. Paul, we asked to have Mr. Moone here today.  
2 Why was Mr. Moone not produced at our request to testify  
3 here today as the executive in charge of the Atari home  
4 video market?

5 A This is a very important day for Atari. It is the  
6 day that in New York City all the Warner communication  
7 executives and Mr. Moone, as President of our Consumer  
8 Division, are announcing to the press the type of promotion  
9 that we will do for Pac-Man. It is a critical day.

10 It is the beginning of the largest product promo-  
11 tion and role-out in our company's history, and Mr. Moone  
12 is there to announce to the press the types of support and  
13 the types of advertising that they will be seeing.

14 Q And that was more important than complying with  
15 our request, is that correct?

16 MR. VITTUM: Objection, your Honor. That's an  
17 argumentative question.

18 THE COURT: Objection will be sustained. Why  
19 don't you ask this witness questions, and if he can  
20 answer it, you make a showing that Mr. Moone can  
21 answer the question and let's see what they are.

22 MR. ANDERSON: I will have the reporter mark  
23 as Defendants' Exhibit 37 an article --

24 MR. VITTUM: May I have one, Mr. Anderson?

25 MR. ANDERSON: It's an article -- would you like  
two?



1  
2 BY MR. ANDERSON:

3 Q I show you, Mr. Paul, an article from the Chicago  
4 Tribune for Monday, March 8, 1982 appearing in Section 5  
5 and I call your attention to the third column, the first  
6 full paragraph, in the middle of the paragraph where it  
7 states, "Atari has captured about 80 percent of the market  
8 followed by Mattel's Intellelevision with about 15 percent  
9 and Magnavox's Odyssey with 3 to 4 percent."

10 Is that any way inconsistent with information  
11 available and considered by Atari in the course of marketing  
12 home video games?

13 MR. VITTUM: Your Honor, the witness has already  
14 testified that he does not have any idea as to the  
15 subject matter of that question. I am not sure how  
16 this interrogation --

17 THE COURT: Let's see what Mr. Paul would say.

18 MR. VITTUM: All right.

19 THE COURT: Objection is overruled.  
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1 THE WITNESS: Could you ask the question again,  
2 please.

3 MR. ANDERSON: Would you read the question.

4 (Record read.)

5 BY THE WITNESS:

6 A Atari does not consider market shares in its  
7 marketing plans of its product.

8 BY MR. ANDERSON:

9 Q Has Atari ever had access to any market share  
10 data?

11 A Occasionally, market share information appears in  
12 articles like this.

13 Q Has Atari ever done any investigation at all  
14 of market shares?

15 A Not to my knowledge, and I believe I would have  
16 known.

17 Q Mr. Paul, is it correct that the Pac-Man cartridge  
18 introduction today has been received in the marketplace  
19 with considerable enthusiasm?

20 A There is a heightened sense of excitement antici-  
21 pating the product introduction, yes.

22 Q Now as you understand the subject matter on which  
23 you have been called here to testify, if Magnavox continues  
24 to sell the Odyssey K.C. Munchkin cartridge, based upon  
25 the best information you have on market shares, to what

1 extent would that reduce the sales of the Pac-Man cartridges,  
2 as far as any studies or investigation or facts that you  
3 have developed and been shown?

4 MR. VITUM: Your Honor, I object to the question  
5 insofar as it refers to a foundation to market share  
6 data. If he wants to ask the witness what effect  
7 continued sales of K.C. Munchkin will have on Atari's  
8 marketing of the Pac-Man cartridge, that's appropriate.

9 THE COURT: Will you accept that suggestion?

10 MR. ANDERSON: I will withdraw the question,  
11 your Honor.

12 THE COURT: Question is withdrawn. Proceed.

13 BY MR. ANDERSON:

14 Q Mr. Paul, doesn't Atari expect that the continued  
15 market reception and enthusiasm for Pac-Man will be the  
16 same as you have experienced so far?

17 A We expect Pac-Man to be the largest selling  
18 cartridge in our company's history. However, if I may  
19 explain, there is confusion in the marketplace, presently.

20 Q Mr. Paul, do you have some documentary basis  
21 for your statement that there is confusion in the marketplace?

22 A Conversations I have had with important buyers,  
23 conversations I had with people in our Marketing and Sales  
24 Group and the adjustments that Atari has made in its  
25 advertising to stress -- we are now having to stress that

1 Pac-Man comes only from Atari.

2 This is a message we are having to convey to  
3 combat confusion from the consumers seeing K.C. Munchkin  
4 and Pac-Man in the market together.

5 Q Do you have any documentation of that aspect?

6 A A piece of paper?

7 Q A piece of paper, yes.

8 A No, I don't have a piece of paper.

9 Q Anything from a customer that's indicated that?

10 A Direct conversations I have had with the senior  
11 buyers of Sears Roebuck yesterday, Mr. Dick Leerberg.

12 Q Do you have a document? If no --

13 A No, I don't.

14 Q There is no such thing?

15 A No such document that I know of.

16 MR. ANDERSON: Your Honor, that concludes the  
17 direct examination.

18 THE COURT: All right. Cross examination.  
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1 MR. VITTUM: Your Honor, we have no cross  
2 examination of Mr. Paul. We do intend to reserve the  
3 right to call him as our own witness at an appropriate  
4 time.

5 THE COURT: All right. You are excused,  
6 Mr. Paul.

7 Your next witness.

8 THE WITNESS: Thank you.

9 (Witness excused.)

10 MR. ANDERSON: I call Mr. Ralph Staup as our  
11 next witness, your Honor.

12 THE COURT: Come forward and be sworn.

13 While this witness is coming to the stand,  
14 I want to tell the lawyers in this case that most likely  
15 we will have to adjourn these proceedings at 11:00 o'clock  
16 and reconvene at 2:00.

17 RALPH STAUP,  
18 called as a witness on behalf of the defendants, having  
19 been first duly sworn, was examined and testified as  
20 follows:

21 THE CLERK: Be seated, please. State your full  
22 name, spell your last name, lean forward and speak  
23 directly into that microphone and keep your voice up.

24 THE WITNESS: My name is Ralph William Staup,  
25 and that last name is spelled S-t-a-u-p.

## DIRECT EXAMINATION

BY MR. ANDERSON:

Q Mr. Staup, did you testify in these proceedings last November?

A Yes, sir.

Q Will you please again state your position with North American Phillips Consumer Electronics Corporation.

A My position is vice president of product development for the Odyssey division.

Q Will you please describe for us, Mr. Staup, what plans, if any, the Odyssey division now has to advertise the K. C. Munchkin game.

A From here forward?

Q From here forward.

A We have no plans for the foreseeable future to spend any national advertising dollars on the K. C. Munchkin cartridge.

Q Have you budgeted any funds at all for national advertising or any advertising?

A For K. C. Munchkin?

Q For K. C. Munchkin.

A No, sir.

Q In your opinion, Mr. Staup, will the presence of K. C. Munchkin on the market have any impact on the sales of Atari or Atari's Pac -Man cartridge?



1 MR. VITTUM: Objection, your Honor. I am not  
2 sure there is any foundation for this witness'  
3 testimony about the sales of Atari's Pac-Man cartridge.  
4 He can speak to his own product, obviously.

5 THE COURT: What about that? You haven't  
6 established that Mr. Staup knows the background,  
7 knows the facts to qualify him to answer that question.

8 That seems to be the basis of the objection.  
9 The objection will be sustained. Ask Mr. Staup some  
10 questions.

11 BY MR. ANDERSON:

12 Q Mr. Staup, does the Odyssey division make  
13 investigations into and accumulate information about market  
14 shares, sales, sales projections of home video game  
15 cartridges?

16 A Well, I guess my answer is going to have to  
17 be very similar to Mr. Paul's. We think we have a feeling  
18 of it, but it comes mostly from secondary sources and  
19 reports.

20 We have not done any trends for market  
21 share data, specifically.

22 Q What basis, if any, would you have for giving  
23 an opinion with respect to the impact on the sales of  
24 Atari or of Atari's Pac-Man cartridges which would result  
25 from Odyssey's continued sale of the K. C. Munchkin



1 cartridge?

2 A I am sorry. Would you repeat that.

3 Q What information, from the investigations and  
4 studies of Odyssey, would you have for estimating the  
5 effect on the market or the impact on the sales of Atari  
6 or Atari's Pac-Man cartridges which will result from the  
7 continued sale of K. C. Munchkin cartridges?

8 A I think the best information I would have there  
9 is the fact that I think as Mr. Paul has said, they  
10 expect to ship a million cartridges in the first month.

11 There is other information in the press  
12 that estimates that their sales will be on the order of  
13 nine million --

14 MR. VITTUM: Objection, your Honor.

15 BY THE WITNESS:

16 A -- cartridges.

17 THE COURT: Why don't you wait until the witness  
18 finishes answering.

19 MR. VITTUM: I apologize.

20 THE COURT: Move against the answer.

21 Finish your answer, Mr. Staup.

22 BY THE WITNESS:

23 A I know what our sales forecast is for the K. C.  
24 Munchkin cartridge for the balance of the year, and doing

25 a simple long division, I come up with our sales of K.C.  
Munchkin which would be four or five percent of the sales of

1 MR. VITTUM: Your Honor, objection to the  
2 extent that it relies on hearsay sources for sales  
3 of Pac-Man.

4 MR. ANDERSON: I think, your Honor, that that's  
5 the nature --

6 THE COURT: That may be the best source of  
7 information. You know, despite what we say about  
8 hearsay, sometimes it may be the only information  
9 we have.

10 No, the objection is overruled. Let it  
11 stand, and we are going to have to look at it in  
12 its entirety. Go ahead.

13 MR. ANDERSON: Thank you, your Honor. No further  
14 direct examination.

15 THE COURT: All right, cross examination.

16 CROSS EXAMINATION

17 BY MR. VITTUM:

18 Q Would your mathematical calculation, Mr. Staup, of  
19 4 or 5 percent, would that translate to about 360,000 units  
20 of K. C. Munchkin approximately?

21 A On an annual basis?

22 Q Yes, sir.

23 A Or for the balance of the year?

24 Q Balance of the year. I believe that was what  
25 your calculation was, wasn't it?

1 A I'm sorry, I don't have my calculator. I'm  
2 not very good at it in my head either. About 4 percent,  
3 I think, which doesn't translate to that number.

4 Q I'm trying to translate that number into an  
5 actual number of units.

6 A No, the actual number of units left to sell  
7 yet this year is considerably less than that in our sales  
8 forecast.

9 Q The number I'm looking for is the total number  
10 of sales of K. C. Munchkin for the year.

11 A For the year?

12 Q Yes.

13 A Yes, it's similar to that number.

14 Q About 360,000 units?

15 A I think it's in that order, yes, sir.

16 Q I will show you, Mr. Staup, a document which  
17 I am marking as Plaintiff's Exhibit 22 for identification,  
18 which is a photocopy of page 8 from the February 22, 1982  
19 Advertising Age, and I direct your specific attention to  
20 the point I have highlighted in yellow in the column  
21 entitled "Last Minute News."

22 Let me just read it. It's only one sentence.  
23 It says:

24 "NAP Consumer Electronics, Knoxville,  
25 will launch a one million-dollar local TV and cable

1 push for Odyssey's K. C. Munchkin video game  
2 cartridge to run in 15 markets this week."

3 Did that news item in Advertising Age  
4 accurately reflect North American Phillips' advertising  
5 plans for K. C. Munchkin as of that time?

6 A No, sir.

7 Q What were North American's plans for advertising  
8 K. C. Munchkin at that time?

9 A We ran this campaign, I think, in the first  
10 two weeks of February.

11 By the time this article was written,  
12 it had already been an accomplished fact and was over with.

13 Q You were aware, were you not, that that period  
14 of time preceded the national introduction for the Atari  
15 Pac-Man cartridge, are you not?

16 A Yes, sir.

17 Q A few minutes ago you gave an indication of  
18 the 1982 sales projections for the K. C. Munchkin cartridge.

19 What are your projections for the sales  
20 of the Odyssey base unit for that same period of time?

21 A I would like to ask our counsel, do I have  
22 to answer that with members of the public here?

23 MR. VITTUM: Your Honor, I would submit that  
24 the information is relevant because the Court of  
25 Appeals both in its original opinion and in its

1 March 11th order remanding pointed out the serious  
2 harm that occurs because of the relationship between  
3 the sales of the Odyssey base unit and the K. C.  
4 Munchkin cartridge. That's the purpose of my  
5 interrogation of this witness.

6 MR. ANDERSON: Your Honor, I object. I think  
7 that would be an inappropriate question. If the  
8 witness can be interrogated in this area based on --

9 THE COURT: Suppose you let him -- no, first  
10 the witness wants to discuss with you whether or not --  
11 why don't you take a few minutes and talk with the  
12 witness. It has been held to be error to refuse a  
13 witness an opportunity to talk with his lawyer,  
14 whether it is in a civil or criminal case.

15 Talk with the witness just a minute and  
16 resolve the matter. We will take a short recess.

17 (Recess taken.)



## Staup - cross

1 THE COURT: Let me tell you that there has been  
2 a development in the case that I was going to trial on.  
3 The matter had to be continued until tomorrow morning  
4 so we have all day for the rest of this hearing.

5 MR. ANDERSON: Thank you, your Honor. We will  
6 try not to consume your entire day.

7 THE COURT: Well, that's all right.

8 MR. ANDERSON: With respect to the pending ques-  
9 tion about the total base unit or console sales, I  
10 have conferred with the witness, Judge Leighton, and  
11 that number is considered to be quite tentative.  
12 If it's necessary to have that total number, we would  
13 like to have that portion taken under a protective  
14 order and under seal.

15 THE COURT: Why don't you do it this way; have  
16 him answer it in writing. He can give you the answer  
17 and you can look at it.

18 MR. ANDERSON: I would offer an alternative also,  
19 your Honor. Mr. Vittum says the reason he needs that  
20 is because of a relationship between the sale of  
21 Odyssey base units and the sale of the K.C. Munchkin  
22 cartridge, and as far as the relationship, we have  
23 no objection in permitting any questions in that area  
24 but avoiding the absolute number about the future  
25 sales and if we can operate that way, I think it would



1 be best.

2 THE COURT: Avoiding only a public answer to the  
3 question, is that what you are saying?

4 THE WITNESS: Yes, sir.

5 MR. ANDERSON: Yes, sir.

6 THE COURT: You are willing to give it to  
7 Mr. Vittum in written form in an envelope, and he can  
8 look at it, is that what you are saying?

9 MR. ANDERSON: Yes. The witness --

10 THE COURT: What is wrong with that?

11 MR. VITTUM: That's fine, your Honor. I have no  
12 further questions in that line then.

13 THE COURT: Then proceed.

14 MR. VITTUM: Okay.

15 BY MR. VITTUM:

16 Q Mr. Staup, I believe you testified earlier to a  
17 number which I think was your calendar year 1982 sales  
18 projection for the K.C. Munchkin cartridge, and am I correct,  
19 that that was a calendar 1982 projection?

20 A Yes, sir. I agreed to your number and I said  
21 it was in that range.

22 Q I understand that. Am I correct that that did not  
23 include sales of K.C. Munchkin during 1971?

24 A '71, sir?

25 Q Excuse me. 1981.

A No, sir, it did not.

1 Q Okay. What were the sales of K. C. Munchkin  
2 cartridges during 1981?

3 A Again, sir, do I have to answer this with a  
4 specific number. I would be happy to write it down on a  
5 sheet of paper.

6 MR. VITTUM: We will take it on the same basis,  
7 your Honor.

8 THE COURT: Same basis. Go ahead.

9 BY MR. VITTUM:

10 Q With respect to your earlier answer, Mr. Staup,  
11 concerning the fact that North American has no present  
12 plans for national advertising, is your answer the same  
13 with respect to local forms of advertising for the K. C.  
14 Munchkin cartridge?

15 A Well, we don't, specifically, plan local  
16 advertising. That's given in terms of funds that are,  
17 essentially, an integral part of the sale.

18 In other words, a percentage of every  
19 sale that's made is, generally speaking, set aside for  
20 local advertising funds.

21 Q That's sales referred to as retailer cooperative  
22 advertising program?

23 A Yes, sir. Yes, sir.

24 Q And the retailer then sends you in a clipping  
25 of the ad he placed, and you reimburse all or part of the  
cost, is that right?

A Yes, sir.

1 Q Is North American still accepting retailer  
2 cooperative advertising reimbursement requests with respect  
3 to K.C. Munchkin?

4 A Well, our terms of sale on co-op are standard  
5 annual terms of sale and there is nothing specifically  
6 different in K.C. Munchkin from any other part of the  
7 product line.

8 Q You have not instructed your dealers or retailers  
9 not to advertise K.C. Munchkin cartridges at retail?

10 A Not to my knowledge.

11 Q In point of fact you have encouraged them to  
12 continue advertising K.C. Munchkin at retail, have you not?

13 A I don't know that we have specifically done that,  
14 sir.

15 Q Let me show you Plaintiff's Exhibit 21 for  
16 identification, a March 5, 1982 letter on the NAP Consumer  
17 Electronics Corp. letterhead, headed "Dear Odyssey Dealer,"  
18 which in its last sentence says: "You may continue to  
19 advertise, display and sell K.C. Munchkin on its merits  
20 as a superior video game."

21 Does that refresh your recollection as to the  
22 position North American has taken with respect to retailer  
23 advertising of the K.C. Munchkin cartridge?

24 A Yes, sir, but I would not consider this to be  
25 encouraging that advertising. If we were going to encourage

1 the advertising, we would have a specific merchandising  
2 program with some kind of a theme and probably ads prepared  
3 by ourselves to run during a certain period of time.

4 We have nothing like that planned.

5 Q This letter in the third paragraph from the bottom  
6 also contains the phrase, Mr. Staup, that, and I quote:  
7 "This means business as usual."

8 North American did instruct its dealers that it  
9 was "business as usual" with respect to K.C. Munchkin on  
10 March 5, 1982, which was the day this Court entered its  
11 injunction, is that correct?

12 A I am not sure what day this Court entered its  
13 injunction. I wasn't --

14 MR. ANDERSON: Your Honor, I object. There was  
15 no time that I know of when an injunction was in  
16 effect from this Court or any other Court that wasn't  
17 stayed. I object to the question as to form and nature  
18 of the comment.

19 THE COURT: As I understand it, the injunction was  
20 issued on the same day I issued the stay.

21 MR. VITTUM: That is correct.

22 THE COURT: The injunction was issued. The objec-  
23 tion is overruled.

24 BY THE WITNESS:

25 A I don't recall the date the injunction was --

1  
2 BY MR. VITTUM:

3 Q But in any case, on March 5 North American was  
4 instructing its dealers that it was "business as usual"  
5 with respect to K.C. Munchkin?

6 A Yes, sir.

7 Q There would be no problem at all involved in  
8 North American instructing its dealers that it would no  
9 longer accept retail advertising reimbursements requests  
10 with respect to K.C. Munchkin, would there?

11 A I don't know the answer to that. We would have  
12 to get the advertising and merchandising manager to talk  
13 about the specifics of that.

14 Q If the injunction that this Court has entered  
15 were to go into effect and the stay were vacated by the  
16 Court, that action by the Court would not cause North  
17 American any problems with respect to national advertising  
18 of K.C. Munchkin, is that correct?

19 A No, sir.

20 Q That is not correct?

21 A I'm sorry, that is correct, it would not cause  
22 us any problems with any planned national advertising that  
23 we have for the foreseeable future.

24 MR. VITTUM: No further questions, your Honor.

25 THE COURT: All right. Any further questions  
of Mr. Staup?



1  
2 MR. ANDERSON: No further questions, your Honor.

3 THE COURT: All right.

4 (Witness excused.)  
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1 MR. ANDERSON: Your Honor, that completes  
2 the witnesses that we intend to call.

3 I would offer in evidence Defendants'  
4 Exhibits 36 and 37, the two articles about which you  
5 interrogated Mr. Paul.

6 MR. VITTUM: No objection, your Honor.

7 THE COURT: All right, 36 and 37 are admitted  
8 in evidence.

9 (Said exhibits were thereupon received  
10 into evidence as Defendants' Exhibits  
11 36 and 37.)

12 MR. ANDERSON: I have one other exhibit that  
13 I would like to offer as Defendants' Exhibit 38, and that's  
14 an advertisement of Sears appearing in the Chicago Sun-  
15 Times for Thursday, March 11, 1982, with respect to the  
16 Pac-Man game.

17 MR. VITTUM: No objection.

18 THE COURT: Admitted in evidence.

19 (Said exhibit was thereupon received  
20 into evidence as Defendants' Exhibit  
21 38.)

22 MR. ANDERSON: Thank you, your Honor.

23 THE COURT: Let me see if I understand the last  
24 question that was asked Mr. Staup and his answer, and also  
25 to put the matter into focus now since there have been so

1 many orders entered in this case.

2 The Court of Appeals in its opinion has  
3 decided what at least for the time being, assuming nothing  
4 else occurs, is the law of this case, hasn't it? Do the  
5 parties agree to that?

6 MR. VITTUM: Yes, sir.

7 THE COURT: Aside from agreeing -- you don't  
8 have to agree with the Court of Appeals. I'm only asking  
9 whether it isn't true as a matter of law that the Court  
10 of Appeals has determined what is the law of this case,  
11 and until that Court of Appeals' determination is set  
12 aside or modified either by the Court of Appeals itself  
13 or by the Supreme Court of the United States, that's the  
14 law of the case, isn't it?

15 MR. ANDERSON: Only on the question of preliminary  
16 injunction, yes, your Honor. It is the decision of the  
17 Court of Appeals on the issue of preliminary injunction,  
18 the question of stay that is, of course, before us now  
19 and the merits. Specifically we agreed to certain things  
20 only for the purpose of the preliminary injunction, and  
21 we want to again reiterate that because I think there are  
22 many other issues that will arise.

23 THE COURT: Then for the purpose of determining  
24 whether a preliminary injunction should be issued, the  
25 Court of Appeals has determined that -- and it is the

1 low of the case for that purpose -- that the K. C. Munchkin  
2 video game when ocularly compared with the Pac-Man video  
3 game is similar.

4 MR. VITTUM: That is correct.

5 THE COURT: They made that determination.

6 MR. VITTUM: That's correct.

7 MR. ANDERSON: Yes, sir.

8 THE COURT: You don't have to agree with the  
9 determination, but that's what they said.

10 MR. ANDERSON: They carved out portions that  
11 weren't and they carved out some portions that were as  
12 they saw it, and we do disagree, I might say.

13 THE COURT: I understand that.

14 Then pursuant to that I issued the  
15 injunction, stayed it.

16 Now, Mr. Staup, as I understand the question  
17 that was asked him, he said that if that injunction were  
18 not stayed, as I understood his answer, he said it would  
19 not adversely affect North American Philips Electronics'  
20 program of nationwide advertising for the K. C. Munchkin  
21 videogame.

22 MR. ANDERSON: Your Honor, Mr. Staup testified  
23 that Odyssey has no present plan or budget for national  
24 advertising in the future, and I think based on that he  
25 said that therefore the injunction would not affect a

1 plan which they don't have.

2 THE COURT: In other words, someone that is  
3 not going to do anything need not be enjoined.

4 MR. ANDERSON: But this is only the national  
5 advertising question, of course.

6 THE COURT: The national advertising. How about  
7 the extent to which they are selling the K. C. Munchkin  
8 game? That's a different matter, isn't it?

9 MR. ANDERSON: Yes, your Honor, it certainly  
10 is, and I think that's an important matter before the  
11 Court today.

12 THE COURT: All right.

13 MR. VITTUM: Has the plaintiff rested -- or  
14 excuse me, defendant rested?

15 MR. ANDERSON: Defendant rests, yes.

16 MR. VITTUM: Your Honor, at this time the  
17 plaintiff would move that the Court vacate the stay it  
18 entered March 5th.

19 Your Honor, in the remand order of  
20 March 11th the Court of Appeals established the law  
21 governing termination of stay. It pointed to the four  
22 factors which the Court must take into account in  
23 determining whether a stay is proper: A strong likelihood  
24 that the defendants will prevail on the merits of the  
25 appeal; irreparable injury to the defendants; no substantial

1 harm to the plaintiffs; and no adverse impact on the  
2 public interest.

3 The Court of Appeals went on to note that  
4 the defendants bore the Burden and that defendants' case  
5 must be very strong for the grant of a stay of the  
6 injunction since the factors for the grant of a stay  
7 coincide with the factors that the Court of Appeals  
8 considered in the opinion it entered on the merits of  
9 the appeal.

10 The Court of Appeals indicated that the  
11 injunction could properly be stayed only if the District  
12 Court finds controlling circumstances not appearing in  
13 the record previously before the Court of Appeals.

14 We would submit, your Honor, that in the  
15 evidence presented on behalf of the defendants nothing  
16 has been advanced that would satisfy any one of the four  
17 elements before the Court, let alone all four of them.

18 There has been no showing with respect  
19 to the likelihood of success on the merits of further  
20 review of the Court of Appeals' decision.



1 There has been no showing --

2 THE COURT: Before you do that, what is the status  
3 of the matter in the Court of Appeals?

4 MR. VITTUM: It is my understanding, your Honor,  
5 that the matter is still in the Court of Appeals. There has  
6 been no petition for rehearing, and the defendants have  
7 stated to the Court of Appeals that they do not intend to  
8 seek rehearing, and that instead, they intend to seek review  
9 by way of a petition for certiorari.

10 THE COURT: Let me think about this for a moment. Now  
11 this was an interlocutory appeal?

12 MR. VITTUM: That's correct.

13 THE COURT: And the Court of Appeals has published  
14 its opinion.

15 MR. VITTUM: Yes, it has.

16 THE COURT: Well, there is nothing else pending in the  
17 Court of Appeals since there's no petition for rehearing.

18 MR. VITTUM: No, your Honor, except that under the  
19 Court of Appeals rule, the mandate in the Court of Appeals  
20 is automatically stayed for 21 days. That 21 days runs  
21 out Tuesday of next week so the mandate has not come down.

22 MR. ANDERSON: And your Honor --

23 MR. VITTUM: But otherwise, you are correct. There is  
24 nothing pending in the Court of Appeals.

25 MR. ANDERSON: Your Honor, we have filed a motion with



1 the Court of Appeals indicating that we do intend, in fact,  
2 to take this matter to the Supreme Court by petition for  
3 writ of certiorari, and certainly Rule 17, specifically,  
4 contemplates providing an opportunity to do that, and we  
5 are seeking that opportunity.

6 I will address the other points in due course.

7 THE COURT: You have the opportunity under the rules.

8 MR. ANDERSON: Your Honor, we would like, and we think  
9 in all fairness, we should have the opportunity to do that,  
10 to complete this appeal.

11 THE COURT: To do what?

12 MR. ANDERSON: To petition the Supreme Court without  
13 having the injunction in effect. With the ability to  
14 continue without changing, without destroying what we have  
15 in the way of sales now going, and we should be able to  
16 continue that.

17 That there is adequate remedy for any injury that  
18 Atari might suffer, and that they cannot show -- and the  
19 evidence here, clearly, shows that they are not suffering  
20 irreparable injury.

21 THE COURT: Let me ask you another question. The  
22 present posture of the matter is that there was an injunction  
23 issued, and there was a stay.

24 MR. VITTUM: That is correct.

25 MR. ANDERSON: Yes, your Honor.

1 THE COURT: And that's the present posture.

2 MR. VITTUM: That is correct, your Honor, and  
3 I am rising to move the Court to vacate the stay at this  
4 time.

5 MR. ANDERSON: We are opposing that motion.

6 MR. VITTUM: If I may continue, briefly, your  
7 Honor.

8 I would submit that the evidentiary  
9 showing presented on behalf of the defendants does not  
10 meet the strong burden and necessity of showing controlling  
11 circumstances that the Court of Appeals, in its letter of  
12 March 11, 1982, indicated would have to be shown to  
13 entitle defendants to a stay.

14 Your Honor, Mr. Anderson simply just  
15 indicated that the defendants' position is that they should  
16 be entitled to a stay in the market until the Supreme  
17 Court has an opportunity to review. It is, precisely,  
18 that point that the Court of Appeals addressed when it  
19 sent it back to this Court with this hearing on the  
20 injunction that the defendants had a strong, heavy burden  
21 to establish and had to come forward with controlling  
22 circumstances not appearing in the review.

23 We submit that there has been no  
24 controlling circumstances. There has been no substantial  
25 showing of harm to the defendant North American. Indeed,

1 North American concedes that there's no harm to it in  
2 connection with its program for advertising K. C.  
3 Munchkin.

4 THE COURT: As I understand it, they are not  
5 going to do any nationwide advertising, but the injunction  
6 has the effect of preventing them from selling.

7 MR. VITTUM: That is correct, your Honor.

8 THE COURT: That's what the whole --

9 MR. VITTUM: That is the precise issue before  
10 you, and it is the presence of the K. C. Munchkin cartridge  
11 on the market, on the retail shelves.

12 We have heard testimony this morning with  
13 respect to Minnesota Fats about how inadvertently, whereby  
14 mistake or what have you, for the second time with the  
15 very same retail company, there was an association of  
16 Pac-Man with K. C. Munchkin. Your Honor, the defendant  
17 misunderstands our point in claiming that the parent  
18 company, North American, had nothing to do with that  
19 mistake. The very point we make is that those mistakes  
20 are happening, and that is extremely injurious.

21 THE COURT: What is the consequence of that?  
22 What is the injury to the plaintiff of that fact? Isn't  
23 that what really this is all about?

24 MR. VITTUM: Sure. A customer comes into the  
25 store, the customer is familiar with Pac-Man, and he has

1 seen the advertising for Atari's Pac-Man and comes into  
2 the store, such as, Minnesota Fats which has already sold  
3 out its initial shipment.

4 Minnesota Fats said, as Mr. Frederico  
5 indicated--

6 THE COURT: By the way, Minnesota Fats has sold  
7 out its supply of Atari.

8 MR. VITTUM: That is correct.

9 THE COURT: You didn't get to how many K. C.  
10 Munchkins they may have had in stock.

11 MR. VITTUM: That's right.

12 THE COURT: We didn't get to that.

13 MR. VITTUM: That's right.

14 THE COURT: All right.

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1 MR. VITTUM: A customer comes in to Mr. Frederico's  
2 store and says, "I want to buy an Atari Pac-Man." He is  
3 told, "You can sign up, pay your money and we will get you  
4 one in April." He is also told, "You can play Pac-Man now  
5 with K.C. Munchkin," and that customer who, at the height  
6 of the popularity of the Pac-Man game, buys not only the  
7 K.C. Munchkin cartridge but he buys the base unit.

8 The Court of Appeals in both its original opinion  
9 and in its order last week has pointed out the significance  
10 of the harm to Atari that occurs when a customer commits to  
11 the Odyssey system as a result of the extreme popularity of  
12 the Pac-Man cartridge, and the Pac-Man game which is used  
13 to sell K.C. Munchkin. That's why you have an injury that  
14 goes far beyond just the initial sale of the cartridge,  
15 your Honor.

16 It is the sale of an entire system, and the sale  
17 of cartridges, other cartridges, that are compatible with  
18 the other system on into the future.

19 Your Honor, we would submit that in terms of any  
20 public interest that is involved, another of the factors  
21 that this Court must consider, there has been no showing  
22 by the defendants that there is any public interest in  
23 favor of retaining K.C. Munchkin on the market. Quite the  
24 contrary. The philosophy of the company by the law and  
25 the trademark law suggests that the public is entitled not



1 to be confused, is entitled to be able to rely on a trademark,  
2 such as, Pac-Man, and to go into a store and to buy genuine,  
3 authorized licensed merchandise and not be diverted into  
4 another product, a product which the Court of Appeals and  
5 the law of the case has determined is an infringing work.

6 Furthermore, your Honor, we would submit that the  
7 timing of this day is of critical importance. As Mr. Paul  
8 testified, we are in the beginnings of the rollout for the  
9 Atari Pac-Man cartridge. Nationwide, the product is moving  
10 into the stores and there's retailer advertising, media  
11 advertising. Mr. Moone today is in New York at the press  
12 briefing for the national introduction of that product.  
13 The continued presence in the marketplace of K.C. Munchkin  
14 hurts Atari.

15 It interferes with Atari's introduction, causes  
16 Atari to have to restructure its advertising to emphasize  
17 that the genuine Pac-Man can only be obtained from Atari,  
18 and Atari wouldn't have to do that if K.C. Munchkin weren't  
19 present in the marketplace. K.C. Munchkin was advertised  
20 and associated with Pac-Man from its introduction in  
21 November, the Christmas season, and now during the introduc-  
22 tion of the Pac-Man cartridge, the Court of Appeals is  
23 concerned about the irreparable injury which it found, as  
24 a matter of law, affected Atari's introduction.

25 The Court of Appeals sent this case back with the



1 instruction that only controlling circumstances, not before  
2 the Court in the record on appeal, could prevent the stay  
3 being vacated. We would submit, your Honor, that the  
4 question of whether K.C.\*Munchkin ought to be able to  
5 continue to be sold in the marketplace, which is the real  
6 issue before this Court, is something that was before the  
7 Court of Appeals, and it's in the record. There is nothing  
8 new about it.

9           So in sum, your Honor, we submit that the burden  
10 has not been met by the defendants. We believe that the  
11 stay should be vacated and furthermore, in light of the  
12 business-as-usual letter which North American rushed out  
13 to its dealers the very same day that the Court entered  
14 the injunction on March 5th, then North American should be  
15 required to circulate a corrective mailing to the Odyssey  
16 dealers informing them of the Court's action and vacating  
17 the stay and advising them of the situation as it exists  
18 accurately in the Courts at this time. Thank you, your  
19 Honor.

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1 MR. ANDERSON: Your Honor, the Court of  
2 Appeals, in its letter, made several points. One that we  
3 should --

4 THE COURT: Letter? The Court of Appeals in  
5 its letter, you said.

6 MR. ANDERSON: In the order of March 11, 1982  
7 made several points that I will address, and that  
8 Mr. Vittum addressed in part, but Mr. Vittum addressed  
9 points that just aren't in issue here now, and I think  
10 tends to detract from addressing the real questions.

11 He discussed the trademark. There's been  
12 no evidence whatsoever of a single person that was confused  
13 on some trademark question, and he says that the trademark  
14 is to avoid confusion. We would agree, and that's why  
15 it's so clear that when Pacific Stereo, for example,  
16 advertises Pac-Man in stock, that's Pac-Man and if someone  
17 wants K. C. Munchkin, they know what K. C. Munchkin is  
18 and they know it plays on an Odyssey console.

19 Now there are two basic points that I see  
20 raised by the order of March 11 of the Court of Appeals,  
21 and the first one is a reference to defendants' continued  
22 advertising. Now I believe that when plaintiff attached  
23 these two Minnesota Fats ads to its motion, somehow it  
24 led to an impression that those were defendants'  
25 advertisings. Defendant has never had a single piece of

1 advertising which referred in any way to Pac-Man, and the  
2 two ads that have been used by the plaintiff were  
3 obvious mistakes of a girl who had been on the job a week  
4 and inadvertently, pulled an old ad and re-ran it and  
5 as she said, tried to improve it a little bit without  
6 any knowledge of the games, without any knowledge of  
7 the problems, and I think, you know, it is extremely  
8 important that that's just one outlet, one retailer out  
9 of thousands in the United States.

10 If plaintiffs could have come in with  
11 another one today, I am sure they would have. I think  
12 that it's clear that this is just a single incident that  
13 should not act to the prejudice of the defendants here  
14 today. That's the first point. The question about  
15 defendants' continue advertising, and it just doesn't  
16 apply --

17 THE COURT: That part is easily taken care of.  
18 I think the evidence shows, can be found that the  
19 defendants are not continually advertising at a time when  
20 plaintiff's protected product is entering the market.  
21 I think that much comes out of the evidence.

22 MR. ANDERSON: Right.

23 Now, then the second point, of course,  
24 is the new controlling circumstance which was not before  
25 or in the record before the Court of Appeals, and that

1 controlling circumstance is critical and basic to the  
2 situation here today. In November, Atari was not on the  
3 market. They testified that they had a substantial  
4 investment in production.

5 They had a pre-production or pre-introduction  
6 investment of a million dollars that they said would  
7 increase to \$5 million by January. In their motion for  
8 the preliminary injunction, they stated to the Court, this  
9 Court, "Unless immediately restrained and enjoined,  
10 defendant will succeed in stealing an immensely valuable  
11 market for a home video version of Pac-Man for which Atari  
12 has properly obtained a license." That was on page 1 of  
13 their motion.

14 It just didn't happen. If there was a  
15 hazard then, and I don't believe there was, the facts since  
16 then, the introduction of their cartridge has totally  
17 belied that contention in their motion.

1 Now in Mr. Vittum's closing argument before  
2 your Honor in November, he made this argument, this  
3 statement from page 310 of our record, "Mr. Moone made  
4 clear his personal involvement had been required because  
5 of the large customers, such as, Sears and K-Mart, who  
6 had booked orders with Atari based on the assumption that  
7 Atari had the exclusive Pac-Man home video game. Mr. Moone's  
8 testimony makes clear that while no orders have yet been  
9 cancelled, it's an absolute certainty that those orders  
10 will be cancelled, and that future orders will be refused  
11 if that premise of exclusivity does not hold up. If the  
12 K. C. Munchkin game is not enjoined, the damage is direct  
13 and certain."

14 The very opposite has occurred, J. C.  
15 Penney which was one of the three companies that Mr. Moone  
16 testified has carried their largest retail advertising  
17 program of the year for Pac-Man. Sears is selling Pac-Man.  
18 Sears Exhibit 38 shows their advertising. K-Mart is  
19 selling it as Ms. Hunton testified to. There just is no  
20 basis.

21 Now after this game is introduced, forming  
22 any proof or evidence or indication of the arguments that  
23 somehow the pre-production investment of Atari would be  
24 diminished, as a result of the sales by K. C. Munchkin,  
25 Your Honor is absolutely correct then and I submit it's  
far more you are correct and will be correct in permitting  
the continued sale of the K. C. Munchkin game.



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1 THE COURT; Well, let me ask you a question. Isn't  
2 it true that in the present posture of this case it is as  
3 if last November I had issued the preliminary injunction?  
4 Isn't that where we are now?

5 MR. ANDERSON: I am sorry, your Honor, I'm not sure  
6 I understood --

7 THE COURT: Well, here is what I mean. As a result of  
8 the Court of Appeals' ruling, the Court of Appeals determined  
9 that contrary to the conclusion that I reached, the plaintiff  
10 had shown a likelihood of success on the merits, and that  
11 the merits was whether or not the K.C. Munchkin home video  
12 game infringed the copyright of Atari to Pac-Man and there-  
13 fore, the Court of Appeals ruled that a preliminary injunc-  
14 tion should have been issued at that time.

15 MR. ANDERSON: Yes, except it was the Midway arcade  
16 game that was involved, but I think yes, your Honor, you are  
17 correct. The Pac-Man home game of Atari wasn't available  
18 or known at that time.

19 THE COURT: But that was -- what was shown here was  
20 what they were going to market.

21 MR. ANDERSON: No, your Honor. I don't think -- to  
22 the best of my knowledge, we never saw what Atari was going  
23 to market.

24 MR. VITUM: We had the Midway large yellow arcade game  
25 before the Court in November. The Atari home video version  
was not in existence and not of record at the time of the



2pr 1

earlier hearing.

2 However, the injunction which Atari sought was  
3 the injunction to protect their introduction of that as  
4 the authorized Pac-Man home video game.

5 THE COURT: Which was the same. It was the same game,  
6 wasn't it?

7 MR. VITTUM: It is Pac-Man, that's right, your Honor,  
8 same characters that the Court of Appeals found present in  
9 the North American Phillips game.

10 THE COURT: What was anticipated to be marketed --

11 MR. VITTUM: Was Pac-Man.

12 THE COURT: -- was Pac-Man.

13 MR. VITTUM: That's right, your Honor.

14 THE COURT: That's what I saw here in the courtroom.

15 MR. VITTUM: That's right. That was the Midway game  
16 which the Court saw.

17 MR. ANDERSON: A game called Pac-Man, your Honor.

18 THE COURT: I'm tempted to disclose to you gentlemen  
19 something which I did not and I think candor and honesty  
20 requires me to do so.

21 You remember that you left that equipment here  
22 over the Thanksgiving Holiday. Do you remember that?

23 MR. VITTUM: Yes, sir.

24 THE COURT: Well, I happen to have some friends in  
25 Centralia, Illinois, one of whom is the clerk of one of the

3pr1 Illinois Appellate Court Judges, and she has two very  
2 precocious youngsters, and they came into this courtroom  
3 and there was Pac-Man and K.C. Munchkin, and they promptly  
4 disclosed that they knew both games very well and that they  
5 were going to play both, and they did, and they turned  
6 around and said to everybody present, "These two games are  
7 identical."

8 (Laughter.)

9 MR. VITTUM: We will stipulate to that, your Honor.

10 THE COURT: But I might tell you that I had the  
11 memorandum, and since this was entirely extra judicial,  
12 I finished the memorandum, but the words of those two  
13 precocious youngsters kept ringing in my ears as I wrote  
14 the memorandum.

15 Now -- but as I recall, the Pac-Man game that  
16 was introduced in evidence here was the game that Atari  
17 was going to market.

18 MR. ANDERSON: Your Honor, I might point out that in  
19 Defendants' Exhibit 34 --

20 MR. VITTUM: May I explain, your Honor.

21 MR. ANDERSON: -- the Atari catalog, Atari states  
22 concerning their new Pac-Man available in March "adapted  
23 from one of the most popular video arcade games ever created,  
24 Atari's Pac-Man, which differs slightly from the original,  
25 is sure to be a big hit in your home."

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MR. VITTUM: That's right.

MR. ANDERSON: I would submit there is nothing in our record at all about what the Atari home video cartridge or game is.

MR. VITTUM: Your Honor --

MR. ANDERSON: We just have never had the cartridge, we have never seen it displayed on a screen. That's an unknown. But it is now on the market and that's a fundamental new changed circumstance. It wasn't on the market. It wasn't even available. We couldn't show it to you. Apparently at least nobody did show it to your Honor back in November.

1 THE COURT: How do I know now that it is the  
2 same?

3 MR. ANDERSON: Your Honor, I don't believe you  
4 do know that.

5 MR. VITUM: Your Honor, first of all the  
6 Atari cartridge is the licensed authorized home video  
7 version of the large Pac-Man game which the Court did have  
8 in evidence.

9 The question of the nature of the Atari  
10 cartridge and what it consists of is not relevant to the  
11 question of whether K. C. Munchkin should be sold in its  
12 condition as a violation of the copyright of the Pac-Man  
13 arcade game, which is the copyright that was before the  
14 Court.

15 The Court of Appeals found that K. C.  
16 Munchkin infringes the copyright in the Midway arcade  
17 version of Pac-Man, and whether or not the Atari product  
18 was on the market at that time or not is not a relevant  
19 factor with respect to the liability that has been found.

20 Now, it is highly irrelevant to the question  
21 of the harm to Atari of having this adjudicated infringement  
22 of the copyright on the market at the very same time  
23 Atari is attempting to roll out with national introduction  
24 of the licensed Pac-Man video game.

25 THE COURT: The home video game.

1 MR. VITTUM: Home video game, yes, sir.

2 THE COURT: Home video game.

3 MR. VITTUM: That's right.

4 MR. ANDERSON: I can't see how counsel can even  
5 contend that what Atari's Pac-Man looks like or plays like  
6 is irrelevant on the issue before us today, because the  
7 issue before us today is not a likelihood of success on  
8 the issue of infringement, I agree with Mr. Vittum, that  
9 was in issue comparing the arcade game that your Honor  
10 saw and that the Court of Appeals deliberated on.

11 With the Odyssey game that's not in issue.  
12 We are not disputing that part of the Court of Appeals'  
13 decision no matter how we disagree with it. The issue today  
14 is the irreparable harm or harm at all of any kind that  
15 Atari will suffer, if any, and that's the issue, from the  
16 continued sale of K. C. Munchkin while we seek review by  
17 the Supreme Court of the United States.

18 We believe fairness and justice should  
19 compel that we be permitted to continue.

20 THE COURT: Continue to sell?

21 MR. ANDERSON: Continue to sell the K. C. Munchkin  
22 while we seek review by the Supreme Court.

23 As I pointed out, I think circuit rule  
24 17 contemplates that. It is not uncommon. It is not  
25 irregular to permit a defendant to proceed to seek review



1 before the Supreme Court and stay an injunction while  
2 we are doing that.

3 Now -- I think maybe we should hear from  
4 the plaintiff, but I submit that there is no basis on  
5 which they can show injury. Mr. Paul's testimony, the  
6 testimony of all of the witnesses here, shows that Atari  
7 has the --

8 THE COURT: And to focus attention on the  
9 issue, the injury would be to Atari from the continued  
10 sale of the K. C. Munchkin video game.

11 MR. ANDERSON: That's the sole issue, how it  
12 will irreparably injure Atari, if at all, or why Atari  
13 couldn't later be completely satisfied in money damages  
14 if it is successful while we seek this review before the  
15 Supreme Court.

16 The facts are so clear. Atari has  
17 introduced it, their game now in March throughout the  
18 United States nationally and apparently they have had  
19 no difficulties.

20 A few hearsay comments about someone who  
21 might question Munchkin doesn't carry today, I submit,  
22 when we have put in such substantial evidence that there  
23 is a new controlling circumstance here that wasn't true  
24 in November.

25 In November Atari was planning to introduce



1 their game in March. They have had testimony about the  
2 tremendous injury, that they would suffer loss of their  
3 pre-Introduction investment and the argument of Mr. Vitten  
4 that future orders will be cancelled, and that didn't  
5 materialize.

6 What was their fear in November has  
7 proven to be totally unfounded and no basis for fear in  
8 March.

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Therefore, there is no evidence of any injury other than their right to recover damage or a royalty or whatever or profits, whatever it may be, and we have put up a million-dollar bond to cover that. So even though we were extremely solvent, and I questioned the necessity of that, we didn't question the bond. We put up the million dollars. There is no problem at all that Atari will be made whole. There is no evidence at all of any injury beyond the injury from the sales that we would make, and what they believe they are entitled to recover based on those sales.

Both products are on the market. They are offered to respective owners of the consoles of Atari or of Odyssey. The trademark has been mentioned. Atari and Midway have exploited the trademark. People who want Pac-Man go and buy Pac-Man. They are not going -- today they are not going to buy Munchkin either thinking they are getting Pac-Man or because Pac-Man is not available, because now it is available. It is on the market. And if anyone buys Odyssey's K.C. Munchkin, your Honor, I submit that it's because K.C. Munchkin is a different game. It has features that are totally different from Pac-Man. It has the moving dots and the features that make it attractive and that's the only reason that anyone is going to buy Munchkin today. If they want Pac-Man they will buy Pac-Man. It's available.

1 If they want Munchkin they will buy Munchkin. There is no  
2 injury at all that can't be compensated.

3 THE COURT: What about this point that Mr. Vittum  
4 makes that the Court of Appeals in its opinion came to the  
5 conclusion that as a matter of law the sale of the K.C.  
6 Munchkin home video game infringes the copyright of the  
7 Pac-Man video game?

8 MR. ANDERSON: Your Honor, the Court of Appeals has  
9 indicated that they see a likelihood of success on the merits,  
10 but they specifically indicate they are not prejudging the  
11 case on the merits, that we are clearly entitled to a trial  
12 and certainly on a trial on the various issues on which we stipu-  
13 lated solely for the purpose of this motion, and we believe  
14 that we will ultimately prevail on the merits of the copy-  
15 right case.

16 THE COURT: I see.

17 MR. ANDERSON: Once we get to it.

18 In addition to that, on the issue of --

19 THE COURT: You will prevail by demonstrating they  
20 are different games?

21 MR. ANDERSON: I think we will prevail on several  
22 different grounds, your Honor. We will develop the  
23 evidence on that further and I believe we can convince  
24 your Honor as well as the Court of Appeals that they  
25 are different games, but that's just one. We believe there

100  
3 1 are other issues.

2 THE COURT: All right.

3 MR. ANDERSON: That will arise that bear very funda-  
4 mentally on whether or not they have a copyright here that  
5 can be enforced, and if so, what it covers and what it does  
6 not cover.

7 In addition to that, the Court of Appeals, of  
8 course, at Page 27 and the top of Page 28 did discuss this  
9 question of irreparable injury. They first indicated that  
10 it is normally a presumption and then they cited only a  
11 few basic statistics that really don't show irreparable  
12 injury at all.

13 The point that Atari has booked orders for Pac-Man  
14 in excess of one million cartridges with a sales value of  
15 over \$24,000,000, that was the circumstance in November.  
16 That circumstance has completely changed. That million  
17 cartridges that caused the Court of Appeals to make this  
18 observation have now been delivered. The \$24,000,000 pre-  
19 sumably -- or they are about to be delivered this week, if  
20 not -- that wasn't exactly clear, but they are being shipped  
21 right now or have been shipped, and they have a sales value  
22 of over \$24,000,000. That means this one to five million  
23 dollars of preintroduction investment that Atari made has  
24 been recouped certainly, and more, so that the circumstances  
25 in November that caused the Court of Appeals to believe,

1 and the facts that they recite at Page 27 has caused them  
2 to believe that there would be an irreparable injury now  
3 have failed to materialize.

4 The very facts that they rely upon have evaporated  
5 and the only question is should K.C. Munchkin be permitted  
6 to stay on the market for a period of time while we seek  
7 review of what the Court of Appeals has done before the  
8 U.S. Supreme Court.

9 We had filed a motion for leave to stay the  
10 mandate while we go to the Supreme Court. We indicated  
11 in that motion --

12 THE COURT: You didn't tell me that you  
13 filed a motion to stay the mandate.

14 MR. ANDERSON: We have filed a motion to stay the  
15 mandate.

16 THE COURT: In the Court of Appeals?

17 MR. ANDERSON: In the Court of Appeals.

18 THE COURT: Has that motion been acted on?

19 MR. ANDERSON: Only by an order that says that will  
20 be taken under advisement, our motion to stay the mandate  
21 while we have the opportunity to go before the Supreme  
22 Court and, your Honor, I think, according to the circuit  
23 rule, the only showing that we are required to make is  
24 that our petition to the Supreme Court is made in good  
25 faith, it is not for purposes of delay, and I submit while



5 1 it is not an issue before you today, you can very clearly --  
2 and I represent to the Court personally now that it is  
3 in very good faith that we pursue this.



1 THE COURT: Let me ask you another question.  
2 How long would this stay take effect if it remains?

3 MR. ANDERSON: As I understand it, the way the  
4 rule structures such a proceeding, we will have 30 days  
5 in which to file our petition for writ of certiorari.  
6 If we file within the 30 days, then the stay of the mandate  
7 and the stay of the injunction, if your Honor sees it the  
8 way we do, the stay of the mandate will continue until  
9 the Supreme Court either rejects or accepts the petition  
10 for a writ, and that could be another -- it is hard to  
11 say, another month or two or whatever it takes the Supreme  
12 Court to review it.

13 THE COURT: Let me see if I follow this. If the  
14 Supreme Court -- let's assume the worst, you always must --  
15 if the Supreme Court denies the petition for certiorari,  
16 the stay will be automatically vacated.

17 MR. ANDERSON: I think that's the way the stay  
18 of the mandate would be entered, your Honor. At least in  
19 my past experience that's the way the stay of the mandate  
20 is entered. It is entered for 30 days, and if the  
21 defendant files its writ, petition for writ within the 30  
22 days, then the stay continues until the petition for the  
23 writ is decided and then, as I understand it, if it is  
24 granted, of course, then we go forward. If it is denied,  
25 then that is the final adjudication of the appeal, final

1 determination of appeal, and it would then come back  
2 down.

3 THE COURT: As far as a preliminary injunction  
4 is concerned.

5 MR. ANDERSON: I think at that point the  
6 preliminary injunction would go into effect upon that  
7 event if it occurs, yes, your Honor.

8 THE COURT: I just want to understand how this  
9 stay would operate.

10 Then we go back to what I said a moment ago,  
11 that we would be in the same position as we would have been  
12 if the preliminary injunction had been issued, in which  
13 case it would stay in effect until the case is heard on  
14 the merits.

15 MR. ANDERSON: The preliminary injunction at that  
16 point would go into effect, and it would say in effect  
17 until we hear the case on the merits, if we are successful,  
18 yes, your Honor.

19 Mr. Williams points out that, of course,  
20 at that time if circumstances have changed, further motions  
21 by either side might be brought and we might seek to have  
22 the preliminary injunction altered or lifted at that time,  
23 but lacking that, I think your Honor's assumptions on  
24 the sequence are correct.

25 I think, your Honor, in conclusion we are

1 asking for this, a continuation of the stay. We are  
2 opposing the motion that the plaintiffs have brought in  
3 the belief that there is absolutely no indication, no  
4 evidence of any injury other than that can clearly be  
5 compensated for in monetary damages. There is nothing that  
6 is irreparable. There is nothing that this plaintiff can  
7 show that is justification for the imposition at this  
8 time while we seek petition of an injunction that will  
9 injure, obviously injure K. C. Munchkin, Odyssey, and  
10 North American Phillips far more than can be justified or  
11 is required.

12 THE COURT: Before you sit down, let me ask you  
13 just to be sure I understand this, then I am going to hear  
14 Mr. Vittum, but am I not correct that the copyright to the  
15 Pac-Man game that was before the Court in November is the  
16 same copyright that covers the home video game that's  
17 now being marketed?

18 MR. ANDERSON: Your Honor, we don't know that,  
19 but I think they have so indicated.

20 MR. VITTUM: Yes, your Honor.

21 THE COURT: They have alleged that.

22 MR. VITTUM: Yes, your Honor.

23 MR. ANDERSON: They have alleged that but we  
24 haven't seen it. Nobody has seen the game in this courtroom.  
25 There is no evidence about what the home game was other

1 than some very general testimony.

2 So we don't know that, but that will be  
3 one of the --

4 THE COURT: By the way, has the complaint been  
5 answered, the complaint filed in this Court?

6 MR. ANDERSON: The complaint was answered and  
7 an amended complaint was filed, and I think that answer was  
8 filed today, was it, or is being filed today.

9 MR. WILLIAMS: It will be filed today.

10 MR. ANDERSON: An answer to the amended complaint  
11 is being filed today. The amended complaint really  
12 differs from the original complaint that we did answer by  
13 alleging a trademark or a Lanham Act violation in addition  
14 to the other allegations of the original complaint.

15 THE COURT: All right.

16 MR. VITTUM: Just a few brief comments, your  
17 Honor.

18 First of all, I would submit that the case  
19 is not entirely in the same posture as though this Court  
20 had granted the preliminary injunction following the hearing  
21 in November. The difference is that an Appellate Court  
22 has entered its determination, and since one of the four  
23 factors that this Court should assess in determining whether  
24 to continue the stay is the likelihood of success on further  
25 review, we have one more Court's determination. That

1 wouldn't have been the case originally.

2 Secondly, I am absolutely amazed at  
3 Mr. Anderson's argument that there is no harm to Atari  
4 because Atari is now on the market. He was arguing the  
5 exact opposite at the hearing last fall, that a preliminary  
6 injunction was not appropriate because Atari was not yet  
7 on the market. Surely he can't have it both ways.

8 THE COURT: What is the harm? You mentioned one  
9 and that is this apparent tendency of people to say that  
10 this is a Pac-Man type game or words to that effect. That's  
11 one of them.

12 MR. VITTUM: That's one. That's one. The  
13 second one is the --

14 THE COURT: You say that as a matter of -- well,  
15 the Court of Appeals, of course, did not decide the merits  
16 of this case.

17 MR. VITTUM: That's correct. That's correct.

18 THE COURT: And rulings ordinarily on motions  
19 for preliminary injunction do not determine the ultimate  
20 issues in the case. So that-- how would you articulate  
21 this? How would you say it?

22 MR. VITTUM: The second point I would make,  
23 your Honor, is that because of the incompatibility of the  
24 cartridges, the Court of Appeals recognized the harm to  
25 Atari is accentuated due to the incompatibility.



1pr, 1  
2 Secondly, the Court of Appeals pointed out that  
3 the short lives of video games make it imperative that the  
4 injunctive relief be granted when it is effective. If  
5 this injunction does not become effective until after the  
6 case goes through certiorari to the United States Supreme  
7 Court, there is a summer recess, it very well may be that  
8 it is the fall of 1982 before the case comes back down.

9 In view of the well known -- there is testimony  
10 in the record to this, your Honor -- short lives of video  
11 games, that is an additional reason why Atari is harmed  
12 during the interim period by the continued sales.

13 THE COURT: What about the other possibility that the  
14 United States Supreme Court will take the case and then  
15 find unanimously as it did in two separate cases recently,  
16 that the Court of Appeals is not correct and that the  
17 District Court was? Supposing that were to happen, then  
18 how would the --

19 MR. VITTUM: Then the case would come back down.

20 THE COURT: What about the harm in the meantime to --  
21 as I understand the injunction, what the plaintiff or the  
22 plaintiffs are arguing for here is to actually shut down  
23 North American Phillips as a marketer and seller.

24 MR. VITTUM: Yes, but --

25 THE COURT: Of the K.C. Munchkin game.

MR. VITTUM: During the period the injunction is in

-2pr1 force, and I would submit that it's a remote chance, but  
2 the Court may very well be right, it may very well be  
3 the case where the Supreme Court reverses. If that's the  
4 case, they can go back on the market with K.C. Munchkin  
5 at that time. A preliminary injunction does not require  
6 them to do anything more than cease the manufacture, promo-  
7 tion and sale. They can put the K.C. Munchkin in inventory,  
8 retain it and go back on the market without any inconvenience  
9 at all.

10 In fact, there is no evidence in today's record,  
11 your Honor, of harm to North American Phillips and that's  
12 one of the factors which North American Phillips has the  
13 burden. In fact, from Mr. Anderson's argument, one sees  
14 the question raised why hasn't Atari established how it  
15 would be harmed.

16 The Court of Appeals made very clear, your Honor,  
17 that the burden is on North American --

18 THE COURT: Yes.

19 MR. VITTUM: And I would submit that they have not  
20 shown any evidence, controlling evidence that overcomes  
21 the factors that were before the Court of Appeals and the  
22 interrelationship between the hardware, the cartridges,  
23 the short lives of the video games, those are matters which  
24 as a matter of law the Court of Appeals determined were  
Fols25 irreparable injury to the plaintiffs.

1pr, THE COURT: Well, one harm that you point out is that  
2 this tendency of people to say that this is a Pac-Man-type  
3 game.

4 MR. VITTUM: That's right.

5 THE COURT: But how does that harm the plaintiff? That's  
6 what I am trying to understand.

7 MR. VITTUM: It harms the plaintiff in two different  
8 ways, your Honor. The plaintiff Midway, which is the copy-  
9 right proprietor of the arcade game, is involved in an  
10 extensive licensing program for dolls, T-shirts, novelties  
11 and many other authorized Pac-Man products.

12 THE COURT: All right.

13 MR. VITTUM: If the game is indiscriminately used  
14 with respect to unauthorized, unlicensed products, that  
15 severely damages Midway's licensing program.

16 As to Atari, it forces Atari to recouch its  
17 advertising so that the advertising message is not, "Come  
18 and get Pac-Man from Atari." You have to convince the  
19 consumer that it is only Atari that they can get Pac-Man  
20 from. It dilutes the effect that would otherwise be given  
21 to Atari's initial start of advertising.

22 All of those factors are harmed by the casual  
23 or indiscriminate or unauthorized association of the Pac-Man  
24 game with an infringing product, such as, K.C. Munchkin.

25 Your Honor, just in closing, I would point out

Apr 1 that at Page 28 of the Court of Appeals opinion --

2 THE COURT: Before you leave that.

3 MR. VITTUM: Sure.

4 THE COURT: Is Mr. Anderson correct in his -- as  
5 I understand the thrust of what he is saying, and I am  
6 adding some words to what he is saying, but it is that  
7 contrary to the allegations of the complaint and the  
8 evidence heard last November and the contentions made,  
9 Pac-Man is such a great video game attraction that instead  
10 of sales being adversely affected, and as a matter of fact,  
11 nobody can find a Pac-Man cartridge to buy today. He is  
12 saying that.

13 MR. VITTUM: Well, your Honor --

14 THE COURT: As I understand what he is saying.

15 MR. VITTUM: Your Honor, if they can't find a Pac-Man  
16 cartridge today, they can get it next month, and if not  
17 next month, next summer and if not next summer, sometime  
18 after that but sooner or later, we will make one and they  
19 ought to buy it from one, and that's what the copyright  
20 law says. We have the authorized right that is protected  
21 subject matter.

22 THE COURT: A monopoly.

23 MR. VITTUM: Authorized monopoly under the statute  
24 and Constitution of the United States.

25

1 THE COURT: And you say, to the extent that  
2 somebody may even think of buying a K. C. Munchkin, that's  
3 damage?

4 MR. VITTUM: If they buy one, your Honor, it is  
5 and we have had testimony of sales, somewhat in excess of  
6 360,000 units projected for this year.

7 The Court of Appeals, your Honor, and  
8 again I just want to, in closing, briefly point out that  
9 the Court of Appeals pointed out that a preliminary  
10 injunction is necessary to preserve the integrity of the  
11 copyright laws which seek to encourage individual effort  
12 and creativity by granting valuable, enforceable rights.

13 If the injunction is stayed, your Honor,  
14 in this context, we submit that there aren't enforceable  
15 rights. That North American Philips is continuing to be  
16 permitted to profit by the marketing of a product that's  
17 been found to be infringed by the Court of Appeals. The  
18 likelihood of the Supreme Court review is something that this  
19 Court can accept, can consider and can exercise its  
20 discretion about, and we would submit, your Honor, balancing  
21 all of these factors and in light of the burden that the  
22 Court of Appeals has established, that the defendants are  
23 not entitled to any further stay and the injunction should  
24 go into effect immediately.

25 As I indicated earlier, also that some form



1 of corrective communication be distributed to the North  
2 American dealers advising them of that fact. Thank you,  
3 your Honor.

4 THE COURT: You want to close, Mr. Anderson?

5 MR. ANDERSON: I would just say the issue here  
6 is not the preliminary injunction, as you pointed out, but  
7 it's the stay of the injunction pending appeal until this  
8 appeal, interlocutory appeal, is resolved. That's the only  
9 issue today, not --

10 THE COURT: I know.

11 MR. ANDERSON: -- the ultimate question of  
12 preliminary injunction until we get to the merits of the  
13 case.

14 Thank you, your Honor.

15 THE COURT: All right. I am going to invite each  
16 side to submit a proposed order. Did you say, Mr. Anderson,  
17 that you think the plaintiffs ought to be heard from?  
18 What is it the plaintiffs will introduce?

19 MR. ANDERSON: I think if they have anything  
20 to support Mr. Vittum's argument, they ought to put it in.  
21 I am not trying to tell plaintiffs how to manage their case.

22 MR. VITUM: I think it's appropriate to make  
23 the motion at the close of the present's case.

24 THE COURT: All right. Will you each propose  
25 an order.

1 MR. VITTUM: I have an order, your Honor.

2 THE COURT: All right. Let me see it, Mr. Grice.

3 MR. ANDERSON: Well, we do not have an order  
4 prepared.

5 THE COURT: I will give you an opportunity.  
6 As I said, I have all the rest of today and you have to  
7 make a status report to the Court of Appeals.

8 MR. VITTUM: At 5:00 o'clock, your Honor.

9 THE COURT: At 5:00 o'clock.

1 MR. ANDERSON: Shall we return -- submit the order  
2 and return it?

3 THE COURT: I suggest to you we reconvene at 3:00  
4 o'clock.

5 MR. ANDERSON: Fine. Thank you.

6 THE COURT: Give me the proposed order you have, and  
7 in the meantime, remember that the plaintiffs did submit  
8 an outline of authorities which I have, and I don't have  
9 any from the defendants.

10 MR. ANDERSON: We -- I am sorry. We don't have an  
11 outline of authority from the plaintiffs.

12 THE COURT: No, what is it?

13 MR. ANDERSON: I am sorry.

14 THE COURT: What is stated in their outline is just  
15 simply the cases with which I am generally familiar, but  
16 if you want to call my attention to any case to the contrary,  
17 you may.

18 MR. ANDERSON: All right. Thank you, your Honor.

19 THE COURT: All right. We will reconvene at 3:00 o'clock.

20 MR. VITTUM: Your Honor, we do have two witnesses that  
21 would be relatively brief if the Court would like to have  
22 the benefit of evidence before it rules, and we will be  
23 more than happy to present that very briefly.

24 THE COURT: All right. Why don't you do that.

25 MR. VITTUM: All right. Mr. Springer will examine the

1 first witness, your Honor.

2 THE COURT: All right.

3 MR. SPRINGER: Your Honor, plaintiff calls Richard  
4 Keegan.

5 RICHARD KEEGAN,  
6 called as a witness on behalf of the plaintiffs, having  
7 been first duly sworn, was examined and testified as follows:

8 THE CLERK: Be seated, please. State your full  
9 name for the record, spell your last name, lean  
10 forward and speak directly into that microphone and  
11 keep your voice up.

12 THE WITNESS: My name is Richard Keegan. I live  
13 in Greenwich, Connecticut.

14 DIRECT EXAMINATION

15 BY MR. SPRINGER

16 Q Mr. Keegan, who do you work for?

17 A Doyle, Dane & Burnback Advertising, Inc.

18 Q What relationship does the Doyle, Dane Advertising  
19 Agency have to Atari?

20 A We are the advertising agency for the computer  
21 games.

22 Q What kinds of advertising has Atari been engaged  
23 in so far with respect to the introduction of the Pac-Man  
24 home video game?

25 A We started first having seen K.C. Munchkin was

advertising and had to make the point that we were coming on the market. We are now introducing Pac-Man itself.

We have had to change our advertising thrust a little bit because, in our opinion, there is confusion as to whether we have the real Pac-Man, and that Pac-Man does play only on Atari video sets.

Q What effect has the presence of K.C. Munchkin had on the marketplace on Atari's advertising program to date?

A We have had, as I say, to change it. We also had to spend additional dollars.

Q And can you qualify for us the amount of additional dollars that Atari has had to spend on advertising by reason of the presence of K.C. Munchkin.

A I say, additional dollars, that would be about two and a half million dollars over what we decided to do in the beginning.

Q \$2,500,000 more than you first planned?

A That's correct.

Q That's just by reason of the fact K.C. Munchkin is on the market?

A That's correct.



1 Q Now we have heard some testimony about Atari's  
2 roll-out, the so-called roll-out plan, and what is going to  
3 happen is that Atari is introducing Pac-Man for home  
4 video this month, is that correct?

5 A That is correct.

6 Q Could you outline for the Court what the Atari  
7 roll-out plan, which is now starting today, entails.

8 A All right. It starts today, as you know, at a  
9 press conference which announces that we are doing this  
10 which is important not only to consumers but to the trade.  
11 It's to clarify confusion that we are Pac-Man and are  
12 coming, and due on April 3rd, it will be the national  
13 Pac-Man day which will be covered in 25 cities which will  
14 be a promotion, and Pac-Man will visit those cities and  
15 there will be contests for kids and so forth.

16 In addition, we are going to print and have  
17 television advertising.

18 Q How much will Atari spend in the next three  
19 or four weeks on the roll-out of the Pac-Man?

20 A Probably \$2.5 to \$3 million.

21 Q Could you tell us and tell the Court what effect  
22 the presence, the continued presence, of K. C. Munchkin  
23 on the market would have on Atari's roll-out plan?

24 A Well, from a creative standpoint, it makes us  
25 change our thrust. Instead of selling the game for what it

1 is, the fun, the enjoyment, we have to make the position  
2 clear that we have the only Pac-Man and it does only play  
3 on our hardware.

4 Q Why do you have to make that position clear?  
5 Why do you have to make it clear that Atari has the only  
6 Pac-Man available on the market?

7 A So the consumer who, I think we believe and I  
8 have evidence at least to believe in our minds will be  
9 confused, they will not know whether or not if they bought  
10 our Pac-Man. They understand that when they buy our  
11 Pac-Man, it works on Atari consoles. If they bought a  
12 K. C. Munchkin, it does not work on our equipment.

13 Q Do you have any view on what effect, if any,  
14 the presence of K. C. Munchkin has on the effectiveness  
15 of the Atari Pac-Man roll-out plan?

16 MR. ANDERSON: I object, your Honor. There is  
17 no foundation for that. It's pure speculation based upon  
18 information that, apparently, this witness doesn't have.

19 THE COURT: Let me hear the question.

20 (Record read.)

21 THE COURT: I assume it's from the point of view  
22 of an advertising agent executive. I assume that.

23 MR. SPRINGER: That's right, your Honor.

24 THE COURT: Based on his experience and  
25 knowledge, with that understanding, the objection will be

1 overruled.

2 Let the witness answer.

3 BY THE WITNESS:

4 A I think it diminishes the effect of Atari's  
5 advertising. One, because it diminishes our share of  
6 advertising. That's how much advertising we have coming  
7 if K. C. Munchkin is in there and two, I think it causes  
8 great confusion in the consumer's mind as to which is the  
9 Pac-Man and what is being sold to them, and what to look  
10 for, more importantly, when they go into the store.

PR1 Q In your view, the presence of K.C. Munchkin on  
2 the market today has the effect of confusing consumers?

3 MR. ANDERSON: I object, your Honor. Leading  
4 the witness.

5 THE COURT: The objection will be sustained.  
6 BY MR. SPRINGER:

7 Q Do you have a view on what the effect on consumers  
8 is of the presence of K.C. Munchkin on the market?

9 A Yes, I think that they are going to be confused.  
10 I think there is a chance, also, they could be, in some  
11 outlets, switched.

12 Q Now when you say you think in some instances they  
13 could be switched, could you elaborate for us.

14 A Yes, you go in to buy -- I will talk in general  
15 terms. You go in to buy a product and the product is not  
16 available. The dealer would like to sell you something  
17 else, make a switch and say that this is the same thing or  
18 just as good.

19 Q If there were dealers out there who are saying,  
20 "Why wait for Pac-Man. You can have K.C. Munchkin now,"  
21 that customer would be steered?

22 MR. ANDERSON: I object, your Honor. No foundation  
23 for that hypothetical.

24 MR. SPRINGER. There is evidence in the record,  
25 your Honor.

THE COURT: The objection is overruled. He may answer.

BY THE WITNESS:

A Yes.

THE COURT: All right.

BY MR. SPRINGER:

Q Mr. Staup testified that he didn't know at all about whether it would be difficult or not to cancel co-op advertising.

Do you recall that testimony?

A Yes.

Q Could you advise us and the Court whether it would be difficult for, in your experience in the advertising business, whether it would be difficult to cancel co-op advertising?

A It has been my experience on accounts I have worked on that a simple letter or a Mail-A-Gram or telegram to the trade saying that there will be no more co-op advertising that they will be responsible for is sufficient to stop it.

Certainly, the circumstances have to be explained but a court order would certainly be clear that it would have to be stopped.

Q What effect would a court order have on the ability of North American to pull out of its advertising commitments, if any?



1 A I am not aware. I guess it gives them no choice  
2 but to go ahead and do that. It adds power to the fact it  
3 has to be done.

4 MR. SPRINGER: I have no further questions, your  
5 Honor.

6 THE COURT: All right. Cross examination.

7 CROSS EXAMINATION

8 BY MR. ANDERSON:

9 Q Mr. Keegan, you indicated that Atari is spending  
10 \$2,500,000 on the roll-out plan?

11 A Yes, sir.

12 Q Is that the entire budget of Atari for Pac-Man  
13 for this period of time?

14 A To this date, we may put more money, but to this  
15 date, yes.

16 Q That's all of it, \$2,500,000 is the total budget  
17 of Atari for advertising?

18 A For this rollout to this date.

19 Q And starting from what time to what time does that  
20 cover?

21 A Starting our advertising which started last week,  
22 two weeks ago.

23 Q And that's, essentially, all the advertising  
24 that has been done on Pac-Man?

25 A No, there was additional advertising done before

-4pr which was teaser advertising done in December and January.

2 Q How much was that? Do you know?

3 A My guess is it was about \$1,000,000.

4 Q What is the name of the company?

5 A The company is called the Keegan Company.

6 Q Where is the company located?

7 A The company is located in the city of New York.

8 Q What is the company's business?

9 A The company's business is to provide advertising services to its clients.

10 Q How long has the company been in business?

11 A The company has been in business for approximately 10 years.

12 Q What is the company's revenue?

13 A The company's revenue is approximately \$10 million per year.

14 Q How many employees does the company have?

15 A The company has approximately 50 employees.

16 Q What is the company's main product?

17 A The company's main product is advertising services.

18 Q How many clients does the company have?

19 A The company has approximately 100 clients.

20 Q What is the company's main market?

21 A The company's main market is the advertising industry.

22 Q How many offices does the company have?

23 A The company has approximately 10 offices.

24 Q What is the company's main office?

25 A The company's main office is located in New York City.

1 Q And you testified that because of K. C.  
2 Munchkin, Atari has increased their expenditure on Pac-Man  
3 advertising, is that correct?

4 A That's correct.

5 Q And you said that they increased it by \$2.5  
6 million?

7 A That's correct.

8 Q Does that mean you wouldn't have had a roll-out  
9 if it wouldn't have been for the Munchkin?

10 A We would have had a roll-out, but it would have  
11 been at a lower rate.

12 Q You said you are only spending \$2.5 million?

13 A I said we are spending \$2.5 million at this  
14 moment. We will continue to spend more money as we go on.  
15 We have not budgeted that money yet.

16 Q What is the total advertising budget of Atari  
17 for Pac-Man from the beginning of Pac-Man?

18 A If you put it together at this moment, it's  
19 probably close to over \$4 million.

20 Q What is your basis for saying that there was  
21 an increase of \$2.5 million in Atari advertising because  
22 of K. C. Munchkin? Is that documented?

23 MR. VITTUM: Objection, your Honor. He has  
24 asked two different questions.

25 MR. ANDERSON: I will ask the first one first.

1 THE COURT: All right.

2 BY MR. ANDERSON:

3 Q What is the basis -- I will strike the whole  
4 question.

5 Q What is your documentary basis for saying  
6 that there was an increase of \$2.5 million in Pac-Man  
7 advertising to cope with K. C. Munchkin?

8 A I am not certain I have documentary evidence other  
9 than we sat down and said that here is what we have to  
10 do and decided to put more dollars and so did the client.

11 Q There is nothing more than that available in  
12 the way of corroboration for your testimony, is that  
13 correct?

14 A Not to my knowledge.

15 MR. ANDERSON: No further questions, your Honor.

16 REDIRECT EXAMINATION

17 BY MR. SPRINGER:

18 Q Mr. Keegan, you mentioned that about \$1 million  
19 was spent in December and January on teaser advertising?

20 A Yes.

21 Q Why was it necessary to spend that \$1 million  
22 on teaser advertising?

23 A To make certain that the consumer and the trade  
24 knew that we had Pac-Man, Atari had Pac-Man, and that was  
25 coming. To blunt what we thought was going to be, and

1 believe, was confusion.

2 Q Where did that confusion come from?

3 A People looking at commercials for Munchkin  
4 and thinking it was Pac-Man.

5 MR. SPRINGER: No further questions, your Honor.

6 RECROSS EXAMINATION

7 BY MR. ANDERSON:

8 Q Mr. Keegan, do you have any of that teaser  
9 advertising with you?

10 A No, I don't. With me, no. It was newspapers.

11 MR. ANDERSON: No further questions, your  
12 Honor. Thank you.

13 MR. VITTUM: Nothing further for this witness.

14 THE COURT: All right. Thank you, Mr. Keegan.

15 THE WITNESS: Thank you.

16 (Witness excused.)

17 MR. VITTUM: Your Honor, at this time I would  
18 like to take the opportunity to offer into evidence  
19 Plaintiffs' Exhibits 21 and 22 for identification which  
20 were marked during the cross examination of witnesses this  
21 morning.

22 THE COURT: Any objection, Mr. Anderson?

23 MR. ANDERSON: No, sir.



1 THE COURT: They are admitted into evidence.

2 (Whereupon said Defendants' Exhibits 21  
3 and 22 were admitted into evidence.)

4 THE COURT: All right. Your next witness.

5 MR. VITTUM: The plaintiffs will call Mr. Paul.

6 THE COURT: Mr. Paul come forward and resume  
7 the witness chair. Mr. Paul has been sworn.

8 CHARLES S. PAUL,

9 called as a witness by the plaintiffs herein, having  
10 been previously duly sworn, was examined and testified  
11 further as follows:

12 DIRECT EXAMINATION

13 BY MR. VITTUM:

14 Q Mr. Paul, I remind you are still under oath.

15 Mr. Paul, has the presence of K. C.  
16 Munchkin on the market available for sale affected Atari's  
17 introduction of the Atari Pac-Man cartridge?

18 A Yes, it has.

19 Q Could you describe how that effect has occurred.

20 A As was previously testified, we had to restructure  
21 our advertising focus in order to correct what we saw as  
22 confusion with not only teaser ads, which told the  
23 consumer that we were coming out with Pac-Man, but also  
24 to restructure our advertising to explain to the consumer  
25 that it was only from Atari that Pac-Man was available.

Paul - direct

1 Q Does the continued presence of K. C. Munchkin  
2 on the market have an effect on Atari's sales of Pac-Man  
3 cartridges?

4 A Absolutely.

5 Q Could you describe how that effect is manifested.

6 A As was stated earlier, a video game has a finite  
7 life and as I testified earlier, also, the sales at the  
8 beginning of the cycle, the product introduction with  
9 all of this advertising surrounding it, the sales have been  
10 going well.

11 The danger to us is in the middle of the  
12 run of a game's life where we are building inventory  
13 and the demand for that inventory softens because of those  
14 sales having already been made for K. C. Munchkin. When  
15 someone buys a K. C. Munchkin, there is no need for them  
16 to buy a Pac-Man.

17 Q Mr. Paul, I show you a document that I have  
18 marked as Plaintiffs' Exhibit 24 for identification which  
19 is a copy of a page from the March 10, 1982 Chicago Sun-  
20 Times. That's Wednesday of last week, and it has a headline  
21 reading: "Munchkin Gets Green Light In Video Games Fig  
22 hase."

23 Mr. Paul, with respect to publicity --

24 THE COURT: Is that the one in which they  
25 said that I stayed an order of the Court of Appeals?

1 MR. VITTUM: I believe it is, your Honor.

2 THE COURT: I want to deny it. If it gets  
3 back up to the Court of Appeals, I want to deny that.

4 All right. Let's proceed.

5 MR. VITTUM: All right.

6 BY MR. VITTUM:

7 Q Mr. Paul, how does the existence of publicity,  
8 such as that reflected in the headline which I read in  
9 Plaintiffs' Exhibit 24, how does that affect Atari's  
10 roll-out of its Pac-Man video game?

11 A That type of publicity and the awareness in  
12 the trade, in other words, major retailers, and the  
13 distribution of this case through publicity like this or  
14 through news traveling through the trade press has  
15 clearly led to the impression that we cannot stop K. C.  
16 Munchkin from selling at retail, and that Atari has somehow  
17 compromised in its ability to enforce its copyright of  
18 Pac-Man.

19 The stay has that effect.  
20  
21  
22  
23  
24  
25

pr 1  
2 Q If Atari had to wait until after the Supreme  
3 Court denied certiorari, before having the benefits of  
4 injunctive relief against K.C. Munchkin, what affect  
5 would that have on Atari's Pac-Man cartridge business?

6 A The orders for video game cartridges come in  
7 waves, as I described. There is an initial wave from  
8 retail orders and then the orders are renewed and extended.

9 This first 45 to 60-day period is critical to us  
10 in our production.

11 The petition for cert -- pending a petition for  
12 cert would overlap with this product introduction, and in  
13 my view, severely damage the length that this game would  
14 run on the shelves for us.

15 MR. VITTUM: No further questions, your Honor.

16 THE COURT: Cross examination.

17 CROSS EXAMINATION

18 BY MR. ANDERSON:

19 Q Mr. Paul, has Atari ever spent \$2,500,000 on the  
20 introduction of a video game, home video game cartridge,  
21 before in promoting it?

22 A Atari has never spent \$2,500,000 on a product  
23 introduction of this type, and we never had to.

24 Q What was the largest sum you have invested in  
25 a product introduction prior to Pac-Man?

A I would say in the neighborhood of \$1,000,000.

Q Do you have any documents to show to support your testimony that there was an advertising restructuring that came about at Atari as a result of Munchkin?

A As was testified to by our advertising executive earlier, that restructuring or refocusing of the strategy on the ads was the result of a number of meetings between the ad agency, the marketing people and top management of Atari.

Q Do you have any specific example of two ads or a proposed ad that was changed in some way, specifically, that we could look at to see exactly what you are talking about?

A Sir, I have the various ads that we have run and to date, from the beginning of the tease campaign, I could revise it and see whether any two of those ads would provide you with that contrast.

The restructuring is just now hitting the markets with our new campaign. A lot of that is in print, radio and television.

Q So you would have to look to compare ads? You don't know of your own testimony now?

A My own, no, I don't. I am sorry, sir.

Q With respect to this article, Plaintiffs' Exhibit 24, did Atari issue any press releases at all with respect to any of the events, with respect to Pac-Man and Munchkin in the last five months?

A I am not sure I understand your question.



1 MR. VITTUM: Your Honor, I will object.

2 BY MR. ANDERSON:

3 Q Has Atari issued any press releases since  
4 November with respect to the Munchkin/Pac-Man dispute?

5 THE COURT: Would you hold it just a moment.

6 MR. VITTUM: Your Honor, I will object to  
7 this question on the grounds of being beyond the  
8 scope of direct. There is no basis for suggesting  
9 that Plaintiffs' Exhibit 24 arrived or came from any  
10 kind of Atari press release. In fact, quite the  
11 contrary, your Honor. It was not the basis of any  
12 press release by Atari so I object to the question  
13 on that basis.

14 THE COURT: What about that?

15 MR. ANDERSON: The question, as I rephrased it,  
16 doesn't refer to this particular newspaper ad at  
17 all, your Honor.

18 THE COURT: Then the objection is overruled.

19 Proceed.

20 BY THE WITNESS:

21 A I believe there was a press release from Warner  
22 Communications in response to the decision by the Court  
23 of Appeals, and I am certain that there was no press  
24 release from Atari or Warner Communications in response to  
25 the stay of this Court of that injunction.

1 BY MR. ANDERSON:

2 Q Do you have a copy of that press release from  
3 Warner Communications?

4 A No, I don't.

5 Q With respect to the various articles that appeared  
6 about Pac-Man in the press resulting in part, at least,  
7 from this litigation, haven't those articles actually been  
8 helpful to Pac-Man in getting Pac-Man's name before the  
9 public?

10 A My opinion, which you are asking for, is that  
11 the articles that have appeared about this litigation have  
12 only heightened the trade's awareness of the fact that there  
13 may be some difficulty that Atari is having in enforcing  
14 its copyright and bringing to the consumer and to the  
15 trade original, copyrighted games only, again, from Atari.

16 The publicity on this litigation has made  
17 it difficult for us to explain to retailers that we have  
18 copyrights that have been licensed to us, and we can  
19 enforce them against infringement.

20 Q You have had to explain that, you say?

21 A Yes, indeed.

22 Q But in fact, you have no documentation that  
23 any order has ever been cancelled as a result of this, is  
24 that correct?

25 A Sir, as I mentioned, the vulnerability of a

1 product sales will come at the middle or the second half  
2 of that product's life cycle. At the beginning after the  
3 product's introduction, with this massive advertising  
4 attended to that introduction, the sales will go quickly  
5 in the beginning. However, the vulnerability is very  
6 real in the middle of the life cycle of the product.

7 Q Has Atari arrived at a projection of the life  
8 cycle of this Pac-Man game that's being promoted in so  
9 many ways, you said dolls, coloring books, I guess, and I  
10 am not sure exactly what else you mentioned.

11 A I have advised top management of Atari that the  
12 life cycle of this product, in some direct extent, to  
13 some direct extent, is dependent on the injunction being  
14 issued by this Court.

15 Q What life cycle have you projected for -- if  
16 you have made a specific projection.

17 A No, we have not. I am sorry.

18 Q You have not?

19 A No, sir.

20 MR. ANDERSON: No further questions, your Honor.

21 MR. VITTUM: Just one brief question, your  
22 Honor.

23

24

25

1535  
Paul - redirect

REDIRECT EXAMINATION

BY MR. VITTUM:

Q Mr. Paul, we have referred to various kinds of vulnerability that Atari has while K.C. Munchkin remains on the market.

Do you have any information with respect to the effect of the continued presence of K.C. Munchkin in the marketplace on other violations of the Pac-Man copyright?

MR. ANDERSON: I object, your Honor. I think that is totally speculative, and in November, you refused to permit testimony about other disputes in other parts of the country and in other courts. The objection should be sustained at this time, too.

THE COURT: What do you mean by "other"?

MR. VITTUM: Your Honor, perhaps we can get the witness to say whether he has a basis for that. What I am driving at, your Honor, is the fact that there are other marketers of software and cartridges which are contended to be infringements of the Pac-Man copyright that we very strongly believe have entered the market because of the success of K.C. Munchkin in maintaining on the market notwithstanding litigation.

MR. ANDERSON: Your Honor, I think that there is no basis at all for answering that question.

THE COURT: That objection will be sustained

1 because I can see some problems.

2 MR. VITTUM: No further questions of this witness.

3 THE COURT: But I want to ask Mr. Paul a question.

4 MR. VITTUM: Surely.

5 THE COURT: Mr. Paul, when was this advertising  
6 for Pac-Man restructured, as you said? When was that  
7 in point of time? Do you know?

8 THE WITNESS: In point of time, it was the result --  
9 advertising strategy evolves out of a series of sessions  
10 and presentations from advertising agencies to the  
11 marketing and top management of a company. This  
12 restructure or refocusing of our ad campaign, the  
13 message we are trying to convey, has been retargeted  
14 over the last, I would say, two to three months.

15 When we realized what was going on in the  
16 marketplace.

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1 THE COURT: When that restructuring decision  
2 was made, to follow up on a question that Mr. Anderson  
3 asked, was there any memorandum prepared that stated,  
4 "Look, as a result of K. C. Munchkin, we have to  
5 restructure this advertising"? Was a memo prepared  
6 or communication that showed the necessity for this  
7 restructuring? That's what I was trying to under-  
8 stand.

9 THE WITNESS: I see most of the documents that  
10 flow between our ad agency and top management. I  
11 haven't seen such a document, but to me that's not  
12 surprising because with business at this pace,  
13 changing as fast as it does, most of our decisions are  
14 made over tables.

15 THE COURT: All right.

16 MR. VITTUM: Your Honor, let me just perhaps  
17 recall to the Court that during Mr. Moone's testimony  
18 last fall he pointed out that Atari was proceeding  
19 with the initial phase of the teaser advertising  
20 as a direct result of K. C. Munchkin's introduction.

21 No further questions.

22 THE COURT: Any other questions of Mr. Paul?

23 MR. VITTUM: No, your Honor.

24 (Witness excused.)

25 THE COURT: Reconvene at 3:00 o'clock.

1 MR. VITTUM: If I may, I just have two exhibits  
2 to get in. Then the plaintiffs will be prepared to rest.

3 THE COURT: All right.

4 MR. VITTUM: I would offer Plaintiffs' Exhibit  
5 24 for identification, which is the Sun-Times article.

6 THE COURT: Any objection, Mr. Anderson?

7 MR. ANDERSON: Not to 24, your Honor, but can  
8 you tell me what 23 is, please?

9 MR. VITTUM: In a minute. I skipped it.

10 MR. ANDERSON: I see, I'm sorry.

11 MR. VITTUM: And as Plaintiffs' Exhibit 23 for  
12 identification, your Honor, we would offer an affidavit  
13 of Mr. Beggs, one of the counsel for defendants, filed in  
14 the Court of Appeals in support of their application for  
15 stay of mandate. It contains statements of the defendants'  
16 position on the merits of the review they would seek on  
17 certiorari.

18 Your Honor, we submit that that is relevant  
19 to the issue of likelihood of success which the Court  
20 should take into account.

21 THE COURT: What does that affidavit show,  
22 may I see it?

23 It states the points that are involved,  
24 is that it?

25 MR. VITTUM: Yes.

1 MR. ANDERSON: No objection.

2 THE COURT: That's admitted in evidence.

3 (Said exhibits were thereupon received  
4 into evidence as Plaintiffs' Exhibits  
5 23 and 24.)

6 THE COURT: Anything else?

7 MR. VITTUM: The plaintiffs rest, your Honor.

8 THE COURT: We will adjourn and meet at 3:00  
9 o'clock. I may have more questions to ask you. I am  
10 going to look at these documents again.

11 MR. VITTUM: Thank you.

12 (Whereupon a recess was taken at 12:30 p.m.  
13 until 3:00 p.m. of the same day, Tuesday,  
14 March 16, 1982.)  
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IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

ATARI, INC., et al.,

Plaintiffs,

vs.

81 C 6434

NORTH AMERICAN PHILIPS CONSUMER  
ELECTRONICS CORP., et al.,

Defendants.

Before the HONORABLE GEORGE N. LEIGHTON

Tuesday, March 16, 1982

3:00 p.m.

The hearing was resumed pursuant to recess.

PRESENT:

MR. DANIEL VITTUM  
MR. DAVID SPRINGER  
MR. MARTIN LAGOD

for the Plaintiff Atari, Inc.;

MR. ERIC COHEN  
MR. DONALD WELSH

for the Plaintiff Midway Manufacturing Co.;

MR. THEODORE W. ANDERSON  
MR. JAMES T. WILLIAMS  
MR. GREGORY B. BEGGS

for the plaintiffs.

1 THE COURT: I have reviewed the two proffered orders,  
2 one by the plaintiff vacating the stay of injunction and  
3 the other by the defendants continuing the stay of injunc-  
4 tion.

5 I have also reviewed the affidavit of Gregory  
6 B. Beggs, which was admitted in evidence. This affidavit  
7 happened to have been filed in the Court of Appeals, stating  
8 the bases which the defendants will rely on in their peti-  
9 tion for certiori.

10 The plaintiffs had submitted earlier an outline  
11 of the points and authorities concerning a stay, and as  
12 the parties have stated in both drafts of the order, this  
13 hearing was conducted in accordance with the order of the  
14 United States Court of Appeals for the Seventh Circuit  
15 dated March 11, 1982, and the purpose of the hearing is  
16 to determine whether the defendants could make the requisite  
17 showing that they will be irreparably injured if this stay  
18 were vacated. I think both parties agree that the burden  
19 is on the defendants to establish the requirement for the  
20 continuance of the stay.

21 If the stay were to remain, it would be pending  
22 the determination in the United States Supreme Court of  
23 the petition for writ of certiorari and if that writ were  
24 granted, the stay would in that event, the stay would  
25 continue until the Supreme Court of the United States



disposes of the proceeding before it.

After reviewing all of these documents, the Court concludes that this stay should be vacated. The plaintiff has filed a bond of a hundred thousand dollars, and as the Court understand it, based on the showing, in the event it were determined that this preliminary injunction should not have been issued, the defendants will be made whole by a plaintiff which everyone concedes is a totally solvent plaintiff and a proper showing can be made as to the injury that may befall the defendants as a result of the preliminary injunction and its continued force during the proceedings in the Supreme Court of the United States.

For these reasons, I am going to enter the order vacating the stay of injunction and I'll do it between now and the time you have to report to the Court of Appeals.

MR. ANDERSON: Your Honor, if the Court is going to enter an order vacating the stay, I would like to address the particular order, if I may, that has been proposed and more particularly, I would like to address the letter that has been proposed.

I think there is no reason -- no basis for requiring the sending of this letter, and I would like to have that portion of the order vacating the stay eliminated, and I think the letter is not couched in proper terms. I think the defendants should have the right and the opportunity to write their own letters or determine their

1 own means by which they comply with the injunction and  
2 not have -- there is no good reason, no cause why we  
3 should have this particular letter made part of the order  
4 vacating the stay.

5 THE COURT: Do you have a copy of the injunction order,  
6 the original injunction order? I don't have it here. Let  
7 me look at the injunction order.

8 MR. ANDERSON: Yes, your Honor.

9 THE COURT: Let me look at it for a moment.

10 What about that, Mr. Vittum? Why do you want to  
11 dictate to the defendants what letter they write to their  
12 own dealers? Why?

13 MR. VITTUM: Well, your Honor, it is not so much that  
14 we want to dictate the terms, we are concerned because on  
15 March 5th they sent out the "business as usual" letter so  
16 promptly. We do think it is important that accurate  
17 information be communicated to the Odyssey dealers.

1 THE COURT: I will sustain that objection, and  
2 look, the order of injunction which has been entered  
3 provides that all of the defendants, their agents, are  
4 restrained from advertising, distributing, displaying,  
5 performing, selling and I take it that the plaintiff is  
6 free to write any letter that it may want to anybody it  
7 desires.

8 No, I don't think we have to go further.  
9 See, this changes the injunction order. It makes it  
10 mandatory. This is a prohibitory injunction. It restrains  
11 the selling, advertising, displaying, performing or  
12 offering for sale a videogame cartridge known as K. C.  
13 Munchkin and from violating the -- I think you are going  
14 further than the injunction order.

15 MR. VITTUM: That was certainly not the intent,  
16 your Honor, but I -- it. It may be a small matter, but

17 THE COURT: Let's stay within this injunction  
18 order. I will sustain the objection and strike the letter  
19 from it.

20 MR. ANDERSON: Thank you.

21 THE COURT: I will prepare the order. It will  
22 be prepared, and I am going to reword it and according to  
23 the ruling I just made, and I will sustain that objection.

24 MR. VITTUM: May I just make one further  
25 comment in that regard, your Honor.

1 THE COURT: Sure.

2 MR. VITTUM: Would the Court entertain a  
3 suggestion of a requirement that the defendant advise the  
4 same persons that it advised of the earlier action of the  
5 Court that the stay has been vacated?

6 MR. ANDERSON: Again, your Honor, I think we  
7 will comply with the injunction. I think a simple order  
8 lifting the stay is all that the Court has to enter or  
9 should enter, and we will be governed by our own conscience  
10 and the risk that we are wrong.

11 MR. VITTUM: The problem --

12 MR. ANDERSON: The plaintiff, as you said, the  
13 plaintiff can do what he pleases.

14 THE COURT: I think, Mr. Vittum, the Court of  
15 Appeals had this injunction order before it and the stay.  
16 Now you are changing it. It may be a small matter, but  
17 you are adding some mandatory provisions that weren't here.

18 I am sure the matter will take care of  
19 itself. I am a little worried about changing these things.

20 MR. VITTUM: All right. I appreciate that,  
21 your Honor.

22 THE COURT: No, just leave it alone.

23 MR. ANDERSON: Your Honor, one other point.

24 THE COURT: The other thing, you have a \$100,000  
25 bond and if you start changing the terms of the order, you

1 may change the obligations under the bond.

2 MR. VITTUM: The point is well taken, your Honor.

3 THE COURT: All right.

4 MR. ANDERSON: Your Honor, as I mentioned this  
5 morning, we had planned to file our answer to the new  
6 amended complaint today and in view of the time, may I have  
7 until tomorrow?

8 THE COURT: You certainly may.

9 MR. VITTUM: No objection.

10 THE COURT: All right.

11 MR. VITTUM: Thank you, your Honor.

12 THE COURT: Thank you.

13 (Which were all the proceedings had and  
14 taken in said cause on said date.)

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Ray A. Smith  
Attorney at Law  
United States District Court  
Southern District of Illinois  
Springfield, Illinois



IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

ATARI, INC., et al.,

Plaintiffs,

vs.

No. 81 C 6434

NORTH AMERICAN PHILIPS CONSUMER  
ELECTRONICS CORP., et al.,

Defendants.

C E R T I F I C A T E

I HEREBY CERTIFY that the proceedings had  
at the hearing of the above-entitled cause before The  
Honorable GEORGE N. LEIGHTON on March 16, 1982 were reported  
in shorthand by me and under my direct personal supervision,  
and that the foregoing transcript, consisting of pages  
1 to 148, inclusive, is a true and correct transcript  
of the original shorthand notes so taken as aforesaid.

*Kay Arboit*

Kay Arboit  
Official Reporter  
United States District Court  
Northern District of Illinois  
Eastern Division